United States Circuit Court of

FOR THE [illegible]

UNITED STATES OF AMERICA, [illegible]

Appellant,

PEARLIE LAWSON, [illegible]
ESTATE OF [illegible]
AND JOHN A. [illegible]
THE ESTATE OF [illegible]
Respondents,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE
STATES FOR THE EASTERN DISTRICT OF

TRANSCRIPT OF RECORD.

Transcript Filed

Jurisdiction of
The Court
Nature of the
Appellees
Statutes Involved
Statement of the

Bradley Hess,
Louisville, Kentucky,
Attorney for Appellees.

FILED

DEC 30 1939

JOHN W. MENZI

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No.....

United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT.

UNITED STATES OF AMERICA, APPELLANT,

VERSUS

PEARLIE LAWSON, ADMINISTRATRIX OF THE ESTATE OF HOBART LAWSON, DECEASED, AND JOHN A. POLIN, ADMINISTRATOR OF THE ESTATE OF HENRY LAWSON, BENEFICIARY, DECEASED, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

TRANSCRIPT OF RECORD.

In the District Court of the United States for the Eastern District of Kentucky.

Pearlie Lawson, Administratrix of the Estate of Hobart Lawson, and Henry Lawson, Beneficiary, Plaintiffs,

vs.

United States of America, Defendant.
U. S. 140.

PETITION—Filed Mar. 30, 1932.

The plaintiff, Pearlie Lawson, says that she is a citizen residing in Harrodsburg, Mercer County, in the Eastern District of Kentucky; and has so resided in

the Eastern District of Kentucky for more than two years last passed; that on October 5, 1924, Hobart Lawson, died, intestate, a citizen and resident of Harrodsburg, Mercer County, in the Eastern District of Kentucky, where he had resided for more than two years prior to his death; and that thereafter, to-wit: on the.....day of....., 19.. this plaintiff, Pearlie Lawson, was by order of the Mercer County Court duly and regularly appointed as administratrix of the estate of Hobart Lawson and duly qualified as such, and is now the duly appointed, qualified and acting administratrix of said estate;

The plaintiff, Henry Lawson, states that he is a citizen and resident of Mercer County, in the Eastern District of Kentucky; that he is the father of the deceased soldier and the beneficiary of the insurance issued to said soldier Hobart Lawson by the United States Government;

Plaintiff further states that Hobart Lawson enlisted in the United States Army on the 9th day of May, 1917, at Fort Thomas, Ky., and that he served therein during the period of the World War until the 1st day of May, 1919, at which time he was discharged honorably therefrom.

Plaintiffs state that after said Hobart Lawson's entry into the Army of the United States, he made application for and was granted insurance in the amount of $10,000.00, effective as of February 2nd, 1918, and that certificate No. 2,228,154 was issued to him in compliance with said application and contract of insurance and the War Risk Insurance Act of Oct. 6, 1917, and that the soldier Hobart Lawson, and the beneficiary designated by said contract of insurance became entitled to the benefits of said Act and that the plaintiffs' decedent, Hobart Lawson, paid the monthly premiums on all of said insurance as prescribed by the Bureau of War Risk Insurance up to and including May 1st, 1919, and that said insurance remained in effect until May 1st, 1919, and for a period of thirty one days thereafter. Plaintiffs file herewith said certificate of insurance No. 2,228,154, issued by the Bureau, as Exhibit "A".

Plaintiffs state that prior to the discharge of said Hobart Lawson, on May 1, 1919, and while his policy was in force, to-wit: On June 24th, 1918, said Hobart Lawson was wounded through the shoulder, and contracted a disease and disability diagnosed as chronic pulmonary tuberculosis, that said wounds, disease and disability have continuously since his discharge May 1st, 1919, until his death from said wounds, disease and disability on October 5th, 1924, rendered him wholly unable to follow continuously, or at all, any substantially gainful occupation; that said disease and disability and wounds were the direct cause of his death, and plaintiffs state that at all times since the discharge of said Hobart Lawson until his death, he was totally and permanently disabled by reason of and as a direct result from said diseases, disabilities and wounds as above set out.

Plaintiff, Pearlie Lawson, Administratrix, states that under the provisions of said War Risk Insurance Act of Oct. 6, 1917, and the World War Veteran's Act of June 7, 1924, and the Acts Amendatory thereto, she is entitled to the payment of $57.50 per month for each and every month transpiring since May 1, 1919, until October 5, 1924; amounting in the aggregate to $.....

The plaintiff, Henry Lawson, says that under said Acts as mentioned above, he, as beneficiary is entitled to the payment of $57.50 per month for each and every month transpiring since October 5, 1924, until rendition of judgment in this action, and will be entitled to said amount per month for each and every month until May 1st, 1939, or until his death, whichever is the earlier date.

Plaintiffs further state that they have made application to the Veteran's Bureau and the Government Agencies which have preceded said Bureau for a rating of permanent and total disability of said Hobart Lawson and for the payment of permanent and total disability benefits from the date of his discharge from the United States Army; that said U. S. Veteran's Bureau and the Director thereof, and the Administrator of Veterans' Affairs, have refused to pay plaintiffs' said insurance for each and every month since decedent's

discharge and have disputed plaintiffs' claim to said insurance for that period, and that a disagreement now exists between the United States Veteran's Bureau and the plaintiffs concerning their right to the payment of $57.50 per month since May 1, 1919.

WHEREFORE, the plaintiff Pearlie Lawson, Administratrix of the estate of Hobart Lawson, prays that the Court adjudge that the War Risk Insurance issued to Hobart Lawson had matured on or before May 1st, 1919, and that said Hobart Lawson's total permanent disability had continued at all times since May 1st, 1919, until his death October 5, 1924, and that she recover judgment against the defendant for $57.50, for each and every month transpiring between May 1, 1919 and Oct. 5, 1924, and for all proper relief, and that her attorney herein be allowed a reasonable fee; The plaintiff, Henry Lawson, prays the Court adjudge that the War Risk Insurance issued to Hobart Lawson had matured on or before May 1st, 1919 and that said Hobart Lawson's total permanent disability had continued at all times since May 1, 191— until his death October 5, 1924, and that he recover judgment against defendant for $57.50 for each and every month from and after October 5, 1924, until rendition of judgment in this action, and until May 1st, 1939, or to the date of his death, whichever is the earlier date; and for all proper relief, and that his attorney herein be allowed a reasonable fee.

BACON R. MOORE,
Attorney for Plaintiffs.

The affiant Henry Lawson says that he is one of the plaintiffs in this action and has read the statements of the petition, and they are true to the best of his knowledge and belief.

Witness:
Thomas Lawson, Harrodsburg, Ky.
Lillie Lawson, Harrodsburg, Ky.

His
HENRY X LAWSON.
Mark

Subscribed and sworn to before me by said affiant, this 29 of March, 1932.

EULA C. MOORE,
N. P. M. C.

(SEAL)

My commission expires Oct. 6, 1932.

ANSWER OF UNITED STATES OF AMERICA—Filed August 31, 1933.

Comes the defendant, United States of America, for answer to plaintiffs' petition herein, and states that it does not have knowledge or information sufficient to form a belief, and therefore denies that the plaintiff, Pearlie Lawson is a citizen residing at Harrodsburg, Mercer County, Kentucky, in the Eastern District of Kentucky, or has so resided in the Eastern District of Kentucky, for more than two years last passed; denies that Hobart Lawson, deceased, was a citizen or resident of Harrodsburg, Mercer County, Kentucky, in the Eastern District of Kentucky, or that he resided there for more than two years prior to his death, or that thereafter, to-wit: on the ..... day of ....., 19.., this plaintiff, Pearlie Lawson, was by order of the Mercer County Court duly or regularly appointed as administratrix of the estate of Hobart Lawson or duly qualified as such or is now the duly appointed, qualified or acting administratrix of said estate.

II.

Defendant states that it does not have knowledge or information sufficient to form a belief and therefore

denies that the plaintiff, Henry Lawson, is a citizen or resident of Harrodsburg, Mercer County, Kentucky, in the Eastern District of Kentucky, or that he is the father of the deceased soldier.

III.

Defendant admits all the allegations in unnumbered paragraph Three of plaintiffs' petition.

IV.

Defendant denies that the soldier, Hobart Lawson, or the beneficiary designated by said contract of insurance became entitled to the benefits of said Act or that the plaintiff's decedent, Hobart Lawson, paid the monthly premiums on all of said insurance as prescribed by the Bureau of War Risk Insurance up to or including May 1, 1919, or that said insurance remained in effect until May 1, 1919, or for a period of thirty-one days thereafter.

V.

Defendant denies that prior to the discharge of said Hobart Lawson or on May 1, 1919, or while his policy was in force, to-wit: June 24, 1918, or at any time, the said Hobart Lawson was wounded through the shoulder or contracted a disease or disability diagnosed as chronic pulmonary tuberculosis, or that said wounds, disease or disability, if any, have continuously or at all, since his discharge May 1, 1919, or at any time, until his death from said wounds, disease or disability, if any, on October 5, 1924, rendered him wholly or at all unable to follow continuously or at all any substantially gainful occupation, or any occupation; denies that said disease or disability or wounds, if any, were the direct cause of his death, or that at all times or any time since the discharge of said Hobart Lawson until his death, or at any time, he was totally or permanently or at all disabled by reason of or as a direct result from said diseases, or disabilities or wounds, if any, as above set out.

VI.

Defendant denies that under the provisions of said War Risk Insurance Act of October 6, 1917, or the World War Veterans Act of June 7, 1924, or the Acts amendatory thereto, she is entitled to the payment of $57.50 per month or any sum per month, for each, or every or any month transpiring since May 1, 1919, until October 5, 1924, amounting to the aggregate sum of $.....

VII.

Defendant denies that under said Acts mentioned above, the plaintiff, Henry Lawson, is entitled as beneficiary, to the payment of $57.50 or any sum per month, for each or every or any month transpiring since the 5th day of October, 1924, until the rendition of judgment in this action, or will be entitled to said amount per month for each or every or any month until May 1, 1939, or until his death, whichever is the earlier date.

VIII.

Defendant admits all the allegations in unnumbered paragraph Eight of plaintiffs' petition.

WHEREFORE, having answered, defendant prays that plaintiffs' petition be dismissed; that they take naught thereby; for its costs herein expended, and for all proper relief.

(Signed) SAWYER A. SMITH,
United States Attorney.

The affiant, Sawyer A. Smith, says that he is the United States Attorney within and for the Eastern District of Kentucky; that the statements contained in the foregoing answer are true, with the exception of those of which there was not sufficient knowledge or information to form a belief, but he states that he believes the latter to be true.

(Signed) SAWYER A. SMITH.

Subscribed and sworn to before me by Sawyer A. Smith, this 31st day of August, 1933.

S. W. STACEY,
Clerk, E. Dist. of Ky.

By FLORENCE DUNHAM, D. C.

(SEAL)

Filed August 31st, 1933.

AMENDED PETITION—Filed July 13, 1934.
S. W. Stacey, Clerk.

Come the plaintiffs, Pearlie Lawson, Administratrix of the estate of Hobart Lawson, and Henry Lawson, beneficiary of Hobart Lawson, and amend their original petition herein, and for amendment state:

They re-affirm, the allegations of the original petition filed herein, except as may be inconsistent with facts set forth herein.

Plaintiffs state that Sections 19 World War Veterans Act as amended July 3, 1930, among other things, provides:

> "No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made, or within one year after the date of approval of this amendatory act, whichever is the later date, * * * PROVIDED, FURTHER, that this limitation is suspended for the period elapsing between the filing in the Bureau of the claim sued upon, and the denial of said claim by the Director."

Plaintiffs state that in conformity with said Act, to-wit: on or about June 5, 1931, as beneficiary of Hobart Lawson's Insurance Policy, the plaintiff Henry Lawson executed form No. 579 in duplicate, and mailed them to the Director of the United States Veterans' Bureau Washington, D. C., demanding insurance benefits, which date was twenty-eight days prior to July 3rd, 1931; that on or about March 18, 1932, said plaintiff received a letter through United States mail, dated March 15, 1932, denying his insurance benefits, the third paragraph of which letter is as follows:

> "If you accept the denial of the claim by the counsel as final, the suspension of the statute of limitation, provided by Section 19 shall cease from and after the date of this letter, plus the number of days usually required by the Post Office Department for the transmission of mail from Washington, D. C. to your last address of record."

Said letter was signed: "By direction, H. L. McCoy, Director of Insurance."

Plaintiffs state that the usual number of days required by the Post Office Department for the transmission of mail from Washington, D. C. to plaintiff's address is three to four days; That demand was mailed June 5, 1931, which is twenty-eight days prior to July 3, 1931. Plaintiff was entitled to the number of days between the time his demand was received by the Veterans Bureau and July 3, 1931, plus the number of days usually required to transmit mail from the Veterans Administration, Washington, D. C., to plaintiff's address: Rose Hill, Route 1, Kentucky,—these days to count from and after March 15, 1932, date of letter transmitting denial. Plaintiff's suit was filed on March 30, 1932, which brings the filing of the petition within the time allowed by Section 19 of World War Veterans' Act, as Amended July 3, 1930.

WHEREFORE, plaintiffs pray as in their original petition, &c.

BACON R. MOORE,
Attorney for Plaintiffs.

ORDER—Entered and filed Jan. 11, 1937.

Came the defendant, United States of America, by its attorney, and produced and filed herein answer to amended petition, and the filing of same is now noted of record.

H. Church Ford,
Judge.

ANSWER TO AMENDED PETITION—Filed Jan. 11, 1937.

Now comes the defendant, United States of America, by its attorney, and for answer to so much of plaintiffs' amended petition herein as it deems necessary and proper to answer, admits that Section 19 of the World War Veterans' Act, as amended July 3, 1930, is as quoted in plaintiffs' petition, but denies that in conformity with said Act, on or about June 5, 1931, as beneficiary of Hobart Lawson's insurance policy, the plaintiff, Henry Lawson, executed Form No. 579 in

duplicate, or at all, and mailed same to the Director of the United States Veterans Bureau at Washington, D. C., demanding insurance benefits, which date was twenty-eight days prior to July 3, 1931; defendant states that it has no sufficient knowledge or information to form a belief, and therefore denies that on or about the 18th day of March, 1932, plaintiff received a letter, through the United States mail, dated March 15, 1932, denying his insurance benefits, the third paragraph of which letter is as follows:

> "If you accept the denial of the claim by the council as final, the suspension of the statute of limitation, provided by Section 19 shall cease from and after the date of this letter, plus the number of days usually required by the Post Office Department for the transmission of mail from Washington, D. C. to your last address of record."

Said letter was signed by H. L. McCoy, Director of Insurance. Defendant further states that it has not knowledge or information sufficient to form a belief, and therefore denies the allegation contained in plaintiffs' petition that demand was mailed June 5, 1931, which was twenty-eight days prior to July 3, 1931; denies that plaintiff was entitled to the number of days between the time his demand was received by the Veterans Bureau and July 3, 1931, plus the number of days usually required to transmit mail from the Veterans Administration in Washington, D. C., to plaintiff's address, Rose Hill, Route 1, Kentucky, these days to count from and after March 15, 1932, the date of the letter transmitting denial. Defendant admits that plaintiffs' suit was filed on March 30, 1932, but denies that it brings the filing of the petition within the time allowed by Section 19, World War Veterans' Act, as amended July 3, 1930.

WHEREFORE, having fully answered plaintiffs' petition as amended herein, defendant prays that said petition be dismissed hence; further prays for its costs herein expended and for all necessary and proper relief.

MAC SWINFORD,
United States Attorney.

The affiant, Mac Swinford, says that he is United States Attorney for The Eastern District of Kentucky, and that statements contained in the foregoing answer are true as he verily believes.

MAC SWINFORD,
United States Attorney.

Subscribed and sworn to before me this 11 day of Jan., 1937.

A. B. ROUSE, Clerk,
By FLORENCE DUNHAM, D. C.

(SEAL)

ORDER—Entered and filed June 22, 1937.

Came the defendant, United States of America, by Mac Swinford, United States Attorney for the Eastern District of Kentucky, and produced and filed herein amended answer to petition and petition as amended, and the filing of same is now noted of record.

H. CHURCH FORD,
Judge.

AMENDED ANSWER TO PETITION AND PETITION AS AMENDED—Filed June 22, 1937.

Now comes the defendant, United States of America, by Mac Swinford, United States Attorney for the Eastern District of Kentucky, reiterating each and every allegation and denial contained in its original answer to the plaintiffs' petition and answer to the amended petition herein, the same as if copied word for word, except as changed and amended by this amendment, and states, having heretofore denied upon lack of information and belief the plaintiffs' receipt of said letter of March 18, 1932, now admits that it was received by the plaintiffs, as alleged in their amended petition, but denies that said letter was the letter of disagreement as alleged by the plaintiffs.

For further answer herein, the defendant states that on October 30, 1931, H. L. McCoy, Director of Insurance, Washington, D. C., mailed to the plaintiff, Henry Lawson, Route No. 1, Rose Hill, Kentucky, the following letter:

> "This is with further reference to the above entitled claim. You are informed that a decision has been rendered by the Insurance Claims Council to the effect that the evidence is not sufficient to establish as a fact that the former insured was totally and permanently disabled at a time when the contract of insurance was in force, and therefore the claim has been denied.
>
> "The claimant may appeal from the decision to the Administrator of Veterans' Affairs by giving notice in writing to this office within sixty days from date of this letter. If claim is not appealed within the time limit, the Council's decision will be referred for approval to the Administrator of Veterans Affairs."

Defendant further states that the plaintiffs failed to appeal from the decision of the Insurance Claims Council within the specified period of sixty days and that thereupon the foregoing letter became, was and is the final letter of denial and disagreement herein.

For further answer herein the defendant states that through error, mistake and inadvertence it admitted in its answer to plaintiffs' amended petition herein, that this suit was filed March 30, 1932, while in truth and in fact the petition was filed in the Clerk's office on March 30, 1932, but the defendant now states and avers that the said suit was not brought or commenced until September 29, 1932, when a copy of the plaintiffs' petition was served upon the United States Attorney for the Eastern District of Kentucky.

For further answer herein the defendant states and avers that the plaintiffs' cause of action herein accrued to them more than ninety days prior to the date of the filing of this suit and therefore pleads and relies upon the statute of limitations in such cases, made and provided as a bar to any recovery on account of the matters and things set forth in the petition and amended petition.

WHEREFORE, having fully answered plaintiffs' petition and amended petition herein, defendant prays as in its original answer to plaintiffs' petition and answer to amended petition.

MAC SWINFORD,
United States Attorney.

The affiant, Mac Swinford, says that he is United States Attorney for the Eastern District of Kentucky, and that the statements contained in the foregoing amended answer are true as he verily believes.

MAC SWINFORD,
United States Attorney.

Subscribed and sworn to before me this 22 day of June, 1937.

A. B. ROUSE, Clerk,
By F. H. DUNHAM, D. C.

(SEAL)

ORDER—Entered and filed June 12, 1939.

This day came the plaintiff, by counsel, and offered for filing an Amendment to the Petition, the Court being advised, it is ordered and the Amendment to the Petition be, and the same is now filed and noted of record.

H. CHURCH FORD,
Judge.

AMENDMENT TO PETITION—Filed June 12, 1939.

Plaintiffs, for amendment to the petition herein as amended, state that:

I.

The plaintiff Henry Lawson, is now deceased, and John A. Polin was appointed, on the 5th day of June, 1939, by the Washington County Court, Administrator of the Estate of said Henry Lawson; and said John A. Polin, as Administrator of the Estate of Henry Lawson, now adopts the allegations of the petition and amended petition heretofore filed, except as same may be changed by allegations of this amendment, and asks that this case

proceed in his name as Administrator of said Henry Lawson.

II.

Plaintiffs reiterate and adopt all of the allegations of the petition and amended petition filed herein, not inconsistent with the allegations made herein; and plaintiffs state further that Hobart Lawson served in the United States Army during the World War, and that he applied for and was granted War Risk term insurance in the sum of $10,000.00, effective February 2, 1918; and that said Hobart Lawson paid the insurance premiums upon the entire $10,000 00 of War Risk insurance as long as he remained in the Army and through the month of April, 1919, and said insurance remained in effect through May 31, 1919.

Plaintiffs state further that Hobart Lawson was wounded in service, and that the Bureau of War Risk Insurance, an agency of defendant in charge of insurance claims, has heretofore determined that Hobart Lawson was disabled from a compensable service connected disability beginning May 2, 1919, while said insurance was in force; and that said Hobart Lawson died on October 5, 1924; and that there was due to said Hobart Lawson from defendant, at the time of his death, unpaid disability compensation in the amount of $128.40; and that his death at that time revived and matured such part of said $10,000.00 of War Risk insurance as said unpaid compensation, as premiums, would have kept in effect, or about $3,500.00 of said insurance; and that Henry Lawson, as dependent father, became entitled under the designation made by said Hobart Lawson, and by reason of the provisions of Section 305 of the World War Veterans' Act to the monthly benefits from such part of said insurance as was received on October 5, 1924; and that benefits accrued upon said insurance during the life of said Henry Lawson, at the rate of approximately $20.13 per month for 150 months from October 5, 1924 to March 21, 1936, and that John A. Polin as Administrator of said Henry Lawson, is entitled now to the sum of $3,019.50 in such accrued benefits.

Plaintiffs state further that by reason of the provisions of Section 305 of the World War Veterans' Act, the widow of said Hobart Lawson, Pearlie Lawson, individually became entitled to the benefits of said revived insurance which accrued subsequent to the death of Henry Lawson; and that she is now personally entitled to benefits at the rate of $20.13 for each and every month since the 21st day of March, 1936, and will be entitled to the remainder of the benefits accruing under said insurance.

Plaintiffs state further that on the 5th day of June, 1931, said Henry Lawson, designated beneficiary, filed claim for benefits under said policy, and that it was denied by letter dated March 15, 1932, and that a disagreement exists as to claims for insurance benefits under said policy, including the claim for benefits on revived insurance from and after October 5, 1924.

WHEREFORE, plaintiffs pray for judgment for the accrued benefits under the revived insurance of Hobart Lawson in the sum of $3,019.50, in favor of John A. Polin, Administrator of Henry Lawson, and in the sum of $785.07 in favor of Pearlie Lawson, individually, and that reasonable counsel fees be allowed to their counsel herein.

BLAKEY HELM,
TRABUE, DOOLAN, HELM & HELM.
Counsel for Plaintiffs.

ORDER—Entered and filed July 11, 1939.

Came the defendant, United States of America, by John T. Metcalf, United States Attorney, and produced

and filed herein its Answer to Plaintiffs' Amended Complaint, and the filing of same is now ordered noted of record.

H. CHURCH FORD,
Judge.

ANSWER TO PLAINTIFFS' AMENDED COMPLAINT—
Filed July 11, 1939.

Now comes the defendant, United States of America, by John T. Metcalf, United States Attorney for the Eastern District of Kentucky, and answering plaintiffs' amended complaint:

I.

Denies for want of information and belief that John A. Polin was appointed on the 5th day of June, 1939, by the Washington County Court, administrator of the estate of Henry Lawson, and denies each and every other allegation of Paragraph 1 of the amended complaint.

II.

Admits that Hobart Lawson served in the United States Army during the World War and that he was granted War Risk Insurance in the sum of $10,000, effective February 2, 1918, on which premiums were paid as long as he remained in the Army, and that said Insurance remained in effect through May 31, 1919.

Denies that Hobart Lawson was wounded in the service; denies that the Bureau of War Risk Insurance

determined that Hobart Lawson was disabled from a compensable service connected disability—beginning May 2, 1919, while said insurance was in force; admits that said Hobart Lawson died on October 5, 1924, but denies that there was due to said Hobart Lawson from the defendant at the time of his death unpaid disability compensation in the sum of $128.40; denies that his death at that time revived and matured such part of said $10,000 War Risk Insurance as said unpaid compensation, as premiums, would have kept in effect, or about $3,500 of said insurance; denies that a disagreement exists as to the claim for insurance benefits under said policy, including the claim for benefits on revived insurance from and after October 5, 1924; denies each and every other allegation contained in Paragraph II of the amended complaint.

III.

Defendant denies each and every allegation contained in the amended complaint not herein specifically denied or admitted.

Wherefore, defendant prays that judgment be entered in its behalf and against the plaintiff, with costs.

JOHN T. METCALF,
United States Attorney.

ORDER—Entered and filed Nov. 28, 1939.

Came the parties hereto by counsel and produced and filed a stipulation of facts agreed upon by the parties by counsel, and the Court being advised, it is ordered

that said stipulation of facts be and it is hereby filed and noted of record;

Further ordered by the Court that this cause be now submitted for findings and judgment upon the facts as stipulated herein and upon briefs; and that the plaintiff is allowed thirty days from the date hereof in which to file his brief, and the defendant is allowed thirty days thereafter in which to file its reply brief.

H. CHURCH FORD.

Approved:

JOHN T. METCALF,
U. S. Attorney.

STIPULATION OF FACTS—Filed Nov. 28, 1939.

It is hereby stipulated and agreed by and between Blakey Helm, attorney for the plaintiffs, and John T. Metcalf, United States Attorney for the Eastern District of Kentucky and Erle McGuffey, attorney, Bureau of War Risk Litigation, attorneys for the United States of America as follows:

I.

That a trial by jury of the above entitled cause be, and the same is, hereby waived.

II.

That the plaintiffs, Pearlie Lawson, as administratrix of the estate of Hobart Lawson, and Henry Law-

son, as beneficiary, were at the time of the bringing of this action residents of the Eastern District of Kentucky.

III.

That the insured, Hobart Lawson, entered the military service of the United States on May 9, 1917, and was honorably discharged therefrom on May 1, 1919.

IV.

That while in the said service the insured applied for and was granted a contract of yearly renewable term insurance in the sum of $10,000, in which he designated his father, Henry Lawson, as beneficiary, and on which payments were last paid to include the month of May, 1919.

V.

That on March 4, 1920, the insured filed in the Bureau of War Risk Insurance a claim (Form 526) for disability of compensation; that thereafter the insured's disability was rated by the said Bureau and its predecessors in office under the dates indicated below as follows:

March 29, 1920:

Temporary partial, 20% (twenty per cent) from date of discharge. Contracted in the service.

July 29, 1920:

Temporary partial 20% (twenty per cent) from date of discharge to July 12, 1920.
Temporary partial 10% (ten per cent) from July 12, 1920, pending examination. Contracted in service.

April 8, 1921:

Surgical: Temporary partial 20% (twenty per cent) from date of discharge to July 12, 1920.
Temporary partial 10% (ten per cent) from July 12, 1920. Contracted in service. Gunshot wound Shoulder.

October 12, 1921:

Surgical: Temporary partial 10% (ten per cent) from 7-12-20 continued. Incident to service (Gunshot wound in shoulder).

May 26, 1922:

Rating of 10-12-21 confirmed and continued: Surgical Rating: Temporary partial 10% (ten per cent) from 7-12-20 continued. Incident to service. (Gunshot wound in shoulder.

February 15, 1924:

Surgical Rating: Temporary partial 10% from discharge to 1-24-24. Incident to service. (Gunshot wound left shoulder).

April 9, 1924:

Rating of February 15, 1924, confirmed and continued.
Surgical: Temporary partial 10% from discharge to Jan 24, 1924.
Permanent partial 10% from Jan. 24, 1924, due to service (Gunshot wound left shoulder.)

July 21, 1924:

Tuberculosis. No disability shown from date of discharge to 6-10-24.
Temporary partial 75% from 6-11-24. Incident to service (Pulmonary tuberculosis, moderately advanced active). Held as incurred in or aggravated by service under the provisions of Public 242, 68th Congress.
Surgical: Temporary partial 10% from discharge to 1-24-24.
Permanent partial 10% from 1-24-24. Incident to service.
Combined: Temporary partial 10% from date of discharge to 1-24-24.
Permanent partial 10% from 1-24-24 to 6-10-24.
Temporary partial 77% from 6-11-24. Incident to service.

August 2, 1924:

Rating of 7-21-24 is corrected to read: Tuberculosis. No disability shown from date of discharge to 6-10-24.
Temporary partial 75% from 6-11-24. Incident to service. Held as incurred in or aggravated by service under the provisions of Public No. 242, 68th Congress. (Pulmonary tuberculosis, moderately advanced active).
Surgical: Temporary partial 10% from date of discharge to 1-24-24.
Permanent partial 10% from 1-24-24. Incident to service. (Gunshot wound left shoulder.)
Combined: Temporary partial 10% from discharge to 1-24-24.
Permanent partial 10% from 1-24-24 to 6-10-24.
Temporary partial 78% from 6-11-24. Due to service.

March 6, 1925:

Tuberculosis: Amending rating of 8-2-24. No disability is shown from date of separation from active service to 6-10-24.
Permanent and total under Reg. 73 on and after 6-10-24 to 10-5-24 (date of death).
Pulmonary tuberculosis, chronic, active, advanced with cavitation.
Service connected under Section 200, World War Veterans' Act 1924.
Opinion as to service connection and permanent and total based upon examination of 6-10-24.
Approved under Reg. 86.
Cause of death. Pulmonary tuberculosis, chronic. Service connected.
Surgical: Temporary partial 10% from date of separation from active service to 1-24-24.
Permanent partial 10% from 1-24-24.
Gunshot wound, left shoulder. Service origin.
Not due to or incident to service. Chronic appendicitis.
Combined. Temporary partial 10% from date of separation from active service to 1-24-24.

Permanent partial 10% from 1-24-24 to 6-10-24. Permanent and total (under Reg. 73) from 6-10-24 to 10-5-24 (date of death.)

VI.

That the insured died intestate on October 5, 1924; that, on October 14, 1924, Pearlie Lawson was appointed administratrix of the estate by the Mercer County Court, State of Kentucky, and is now acting in that capacity; that Henry Lawson, the designated beneficiary, died intestate on March 21, 1936; the certificate of the Bureau of Vital Statistics, State of Kentucky, of the death of Henry Lawson is filed herewith and made a part hereof; that John A. Polin was appointed as administrator of his estate by the Washington County Court, State of Kentucky, on June 5, 1939, and is now acting in that capacity; that an attested copy of the order of appointment and qualification of said administrator is filed herewith and made a part hereof.

VII.

That on June 9, 1931, Henry Lawson, the designated beneficiary, filed in the Veterans' Administration a claim for insurance benefits alleging permanent and total disability of the insured from date of discharge, and demanded administrative payment thereof; that the Insurance Claims Council of the Veterans' Administration on October 27, 1931, rendered a decision that the insured, for insurance purposes, was not permanently and totally disabled as alleged but that he was so disabled from June 10, 1924, and it is agreed that the insured became permanently and totally disabled for insurance purposes on June 10, 1924; that Henry Lawson was notified by letter dated October 30, 1931, from H. L. McCoy, Director of Insurance, of the decision of the Insurance Claims Council and further informed that, "The claimant may appeal from the decision to the Administrator of Veterans' Affairs by giving notice in writing to this office within sixty days from date of this letter. If claim is not appealed within the time limit, the Council's decision will be referred for approval to the Adminis-

trator of Veterans Affairs''; that under date of March 5, 1932, Bacon R. Moore, the original attorney for plaintiffs, addressed a communication to the Veterans' Administration, which was received on March 8, 1932, requesting to be advised whether the Administrator had approved the decision of the Insurance Claims Council so that suit could be filed; that, Henry Lawson, was notified by letter dated March 15, 1932, from H. L. McCoy, Director of Insurance, that the Insurance Claims Council rendered a decision on October 27, 1931, to the effect that the evidence was not sufficient to establish as a fact that the insured was totally and permanently disabled at a time when the contract of insurance was in force and that, therefore, the claim had been denied, that such denial may be considered final for the purposes of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended, and that if he accepted the denial of the claim by the Council as final the suspension of the statute of limitations provided by Section 19, *supra*, shall cease from and after the date of the said letter; that no other claim for insurance benefits of any character was or has been filed in the Veterans' Administration or its predecessor agencies; that this action was commenced on March 30, 1932, alleging that the insured became permanently and totally disabled while his said insurance contract was in force and that the plaintiffs were entitled to recover the whole amount thereof; that thereafter and on June 12, 1939, an amended complaint was filed alleging the revival of insurance under Section 305, World War Veterans' Act, 1924, as amended, by reason of the death of the insured on October 5, 1924.

VIII.

That the Veterans' Administration has determined and it is a fact that on June 10, 1924, the date of permanent and total disability of the insured for insurance purposes, there was no uncollected compensation available to revive insurance under Section 305, *supra;* that the Veterans' Administration has determined and it is a fact, that by virtue of the rating decision of March 6, 1925, set forth in Paragraph V, *supra*, there was uncol-

lected compensation due the insured on the date of his death in the sum of $128.40, which amount in its entirety accrued subsequent to June 10, 1924, the date of permament and total disability of the insured.

IX.

That none of the disability compensation payable by virtue of the rating decisions set forth in Paragraph V, *supra*, except the additional amount authorized by the rating decision of March 6, 1925, totaling $128.40 payable wholly for the period from June 10, 1924 to October 5, 1924, remained uncollected upon the date of death of the insured.

X.

That there is attached hereto and made a part hereof, a photostatic copy of an original communication, dated August 28, 1939, from Frank T. Hines, Administrator of Veterans' Affairs, to the Director, Bureau of War Risk Litigation, Department of Justice, setting forth the administrative practice of the Veterans' Administration and its predecessors, relating to the question whether lapsed yearly renewable term insurance may be revived and matured under the provisions of Section 305, *supra*, upon the death of the insured by uncollected disability compensation accruing wholly after the date of permanent and total disability of the insured for insurance purposes; and it is stipulated and agreed that the attached copy of the communication of August 28, 1939, contains a correct statement of the administrative practice in this respect.

In witness whereof the parties hereto, by their respective counsel, have hereunto subscribed their names, this 27 day of November, 1939.

BLAKEY HELM,
Attorney for Plaintiff.

JOHN T. METCALF,
United States Attorney.

ERLE McGUFFEY,
Attorney, Bureau of War Risk Litigation.

Seal

VETERANS ADMINISTRATION—Filed Nov. 28, 1939.

Office of
The Administration of
Veterans Affairs.

Washington.
August 28, 1939.

Honorable Julius C. Martin,
Director of Bureau War Risk Litigation,
Department of Justice,
Washington, D. C.

Lawson, Hobart
XC-343,036

My dear Mr. Martin:

I have your letter of August 5, 1939 in which you stated that it was your understanding that the Veterans' Administration's practice has been consistent with an administrative interpretation that the law prohibits the application of disability compensation payable after the date of permanent total disability for insurance purposes to the revival of insurance under the provisions of Section 305 of the World War Veterans' Act, and requested that you be advised fully in regard to the administrative interpretation and practice in cases of this kind.

It has never been the practice of the Veterans' Administration, or its predecessors, to use disability compensation accruing between the date upon which the insured became permanently and totally disabled for insurance purposes and the date of death for the

purpose of payment of insurance under the provisions of Section 305 of the World War Veterans' Act. Bulletin No. 1 issued by the Director of the Bureau of War Risk Insurance in the Treasury Department on October 15, 1917, pursuant to the provisions of Section 402 of An Act to Amend an Act to Authorize the Establishment of a Bureau of War Risk Insurance in the Treasury Department, which in part established the terms of the contract of insurance, provided in part as follows:

> "Insurance will be issued for any of the following aggregate amounts upon any one life * * * which installments will be payable during the total and permanent disability of the insured, or if death occur without such disability, for two hundred and forty months, or if death occur following such disability, for a sufficient number of months to make two hundred and forty in all, including months of disability already paid for, in both cases except as otherwise provided."

Noted 8/30/39
DW

XC-343,036

Honorable Julius C. Martin

It has always been the position of the Bureau of War Risk Insurance and the Veterans' Administration that the rights under a contract of insurance which matured by reason of permanent total disability for insurance purposes became fixed on the date of maturity, that is, the date of permanent and total disability for insurance purposes. This question arose in connection with the amendment of July 2, 1926 to Section 305, which provides that insurance hereafter revived shall be paid only to the insured, his widow, child or children, dependent mother or father, and in the order named, unless otherwise designated by the insured during his lifetime or by last will and testament. Under this amendment it became necessary to determine under what circumstances insurance should be paid only to the restricted class of beneficiaries as insurance hereafter revived. This question was considered by the Attorney General and in an opinion of June 22, 1927 he stated:

> "I agree with the conclusion of the General Counsel of the Bureau that the revival takes place upon the occurrence of the death or permanent total disability, and not when the Director decides that the insurance is again in effect, or pays the first installment."

It was further held that upon the happening of the events prescribed by the statute as necessary to effect revival of the insurance, including the event of death or permanent total disability for insurance purposes, the rights of the insured or of the beneficiaries became fixed. Upon the basis of this option, in those cases in which the insured became permanently and totally disabled for insurance purposes prior to July 2, 1926, insurance revived under Section 305 was paid without reference to the restricted class of beneficiaries set forth in the amendment of that date, even though the death of the veteran occurred subsequent to the amendment.

XC-343,036

Honorable Julius C. Martin

The view that the rights under Section 305 were fixed as of the date of permanent total disability for insurance purposes was affirmed by the Comptroller General in opinion of April 5, 1928 in connection with the claim of Hardin Neal Cox, C-1,092,208. This veteran had compensation due him at the time he became permanently and totally disabled for insurance purposes, but received payment of the compensation prior to his death. The Comptroller General held:

> "That the subsequent collection by a soldier of all compensation which was uncollected at the time of his permanent and total disability does not operate to defeat the provisions of Section 408 of the War Risk Insurance Act as amended (42 Stat. 1525) which Section was reenacted as Section 305 of the World War Veterans' Act, 1924."

The question of the maturity date of insurance was also considered on numerous occasions in connection with the provisions of Section 17, Public No. 2, 73rd Congress. It was held by this office in the case of William

McGrath, XC-396,623, which served as a basis for Administrator's Decision 124, that the date of permanent total disability for insurance purposes was the date of maturity of the contract.

The United States Government Life Insurance policies issued by the Veterans' Administration provide as follows:

> "Upon due proof of the total permanent disability of the insured while this policy is in force, the monthly installments shall, except as hereinafter provided, be payable to the insured and continue to be so payable during total permanent disability so long as he lives, and payment of all premiums due after receipt of such proof during total permanent disability shall be waived."

The United States Circuit Court of Appeals, Fourth Circuit, in the case of United States of America, Appellant v. Sara A. Ellison, Administratrix of Personal Estate of Carl R. Ellison, Deceased, and Maude Johnson Ellison, Appellees, held as follows:

XC-343,036

Honorable Julius C. Martin

> "The finding by the court that insured was totally and permanently disabled at the time of the award, settles the rights of plaintiffs under the policy; for it matured when insured became totally and permanently disabled, if in force at that time, and no further payment of premiums was required."

It is, and has been the opinion and practice of the Bureau of War Risk Insurance and the Veterans' Administration that the insurance matures at the date of permanent and total disability for insurance purposes, and that if there is no date of permanent and total disability for insurance purposes, then at the date of death, and that no insurance could be revived under the provisions of Section 305 as of the date of death of an insured who had previously been permanently and totally disabled for insurance purposes, since any contract of insurance he might have had in force by reason of Section 305 or otherwise would have matured on the

date of permanent and total disability for insurance purposes, and the rights under the contract would have been fixed as of that date.

Very truly yours,

Frank T. Hines,
Administrator.

COMMONWEALTH OF KENTUCKY—
Filed Nov. 28, 1939.

State Department of Health
BUREAU OF VITAL STATISTICS
Louisville, Ky.

No. 3160

I, J. F. Blackerby, State Registrar of Vital Statistics, do hereby certify the following to be a true ... of the CERTIFICATE OF DEATH OF

1. PLACE OF DEATH

Henry Lawson

(...nty of Washington on file in THE BUREAU OF VITAL STATISTICS OF KENTUCKY Voti... Perryville, #7 Registration District No. 1428 File No. 9355 Incorporated Town Springfield Primary Regi... ...er No. 7770 Registered No. 1124 City.....No..... St. .....
(If death occurred in a hospital or institution, give its name instead of street and number)
Length of residence in city or town where death occurred.....yrs. .....mos. .....ds.
How long in U. S. If foreign birth.....yrs.....mos.....ds.

2. FULL NAME Henry Lawson

(a) Residence: No. .....St. .....Ward .....
(Usual place of abode) (If non-resident give city or town and ...

PERSONAL AND STATISTICAL PARTICULARS	MEDICAL CERTIFICATE OF DEA...
3. Sex. 4. Color or Race. 5. Single, Married. Widowed or Divorced (Write the word) Male White Widower	21. Date of Death. Mch. 21. 1936.
Widowed or Divorced (Write the word) 5a. If married, widowed, or divorced Husband of (or) Wife of Sis Tyler Lawson.	22. I Hereby Certify, That I attended dec... Mar. 18, 1936 to Mch. 20, 1936. I last saw h... Mar. 20, 1936, death is said to have occurred ... stated above, at ....m. The principal cause ... and related cause of importance in order of ... as follows Influenza
6. Date of Birth. July 27-1858.	
7. Age Years 77 Months 7 Days 23 If less than 1 day hrs. or min.	Contributory cause of importance not related ... cipal cause: *Interstetial* Nephritis Name of operation.....Date of... What test confirmed diagnosis..... Was there an autopsy .....
8. Trade, profession, or particular kind of work done, as spinner, sawyer, bookkeeper, etc. Retired farmer. 9. Industry or business in which work was done, as silk mill, sawmill, bank, etc..... 10. Date, deceased last worked at this occupation (month and year) ..... 11. Total time (years) spent in this occupation....	23. If death was due to external cause ... fill in also the following: Accident, suicide, or homicide.....Date ... .19..... Where did injury occur... (Specify city or town, county, and st... Specify whether injury occurred in industry, ... or in public place. Manner of injury ..... Nature of injury .....
12. BIRTHPLACE. Mercer Co., Ky.	
FATHER—13. Name John Lawson. 14. BIRTHPLACE. Mercer Co., Ky.	24. Was disease or injury in any way ... occupation of deceased..... If so, specify ..... (Signed) D. M. Godley, M... (Address) Perryville, Ky.
MOTHER—15. Maiden Name *Matherly.* 16. BIRTHPLACE. Mercer Co., Ky.	
17. INFORMANT. Mrs. *Claylod* Bugg (Address) Harrodsburg, Ky.	
18. BURIAL, CREMATION, OR REMOVAL. Place Deep Creek Cem. Date Mch. 22, 1936.	
19. UNDERTAKER. Alexander & Royalty. (Address) Harrodsburg, Ky.	
20. Filed April 2, 1936. Elizabeth Loe, Registrar.	

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the official seal to be affixed, at Louisville, Ky., this 17 day of November in the year of our Lord one thousand nine hundred and Thirty Nine.

J. F. BLACKERBY,
State Registrar.

WASHINGTON COUNTY COURT—Filed Nov. 28, 1939.
Called Term, June 5th, 1939.

On motion of Thomas Lawson, a son of Henry Lawson, deceased, who died intestate in and a resident of Washington County, Kentucky, on the 21st day of March, 1936, it is ordered by the Court that John A. Polin be, and he is hereby appointed Administrator of the estate of the said Henry Lawson, and the amount of his bond is fixed at One Hundred Dollars ($100.00).

Whereupon, came John A. Polin and accepted said Administratorship and qualified to act by taking oath and executing bond, conditioned according to law, with Joseph Polin as his surety, in the sum of One Hundred Dollars ($100.00), which bond is approved by the Court. A Copy—Attest:

JOHN M. SMOTHERS, Clerk
Washington County,
(Kentucky) Court,

By MAY CONWAY, D. C.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
Filed June 28, 1940.

This cause coming on to be heard and trial by jury having been specifically waived by agreement of counsel and submitted to the Court on the pleadings, exhibits, a stipulation of facts with exhibits, all of which sets forth an agreed statement of the case as the evidence upon the question to be decided, and upon oral argument, and

the Court having considered all the evidence and heard the arguments of counsel, and being advised, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact.

1. That the plaintiffs, Pearlie Lawson, as administratrix of the estate of Hobart Lawson, and Henry Lawson, as beneficiary, were at the time of the bringing of this action residents of the Eastern District of Kentucky.

2. That the insured, Hobart Lawson, entered the military service of the United States on May 9, 1917, and was honorably discharged therefrom on May 1, 1919.

3. That while in the said service the insured, Hobart Lawson, applied for and was granted a contract of yearly renewable term insurance in the sum of $10,000, in which he designated his father, Henry Lawson, as beneficiary; that said policy lapsed for nonpayment of the premium due June 1, 1919; that at the time it lapsed the insured was suffering from a compensable disability; that thereafter, to-wit, on March 6, 1925, it was found and determined that the insured became permanently and totally disabled for insurance purposes as of June 10, 1924; that on said date of permanent and total disability of the insured there was no uncollected compensation available to revive insurance under Section 305, World War Veterans' Act, as amended; that by virtue of the rating decision of the Veterans Administration on March 6, 1925, there was uncollected compensation due the insured on the date of his death on October 5, 1924, in the sum of $128.40, which amount in its entirety accrued subsequently to June 10, 1924, the date of permanent and total disability of the insured; that said amount of $128.40 for disability compensation remaining uncollected upon the date of the insured's death was payable wholly for the period from June 10, 1924, to October 5, 1924.

4. That the insured died intestate on October 5, 1924 and Pearlie Lawson was duly appointed administratrix of his estate and is now acting in that capacity; that Henry Lawson, the designated beneficiary, died

intestate on May 21, 1936, and that John A. Polin was duly appointed and qualified as administrator of the estate of said Henry Lawson and is now acting in such capacity.

5. That on June 9, 1931, Henry Lawson, the designated beneficiary, filed in the Veterans Administration a claim for insurance benefits, alleging permanent and total disability of the insured from date of discharge, and demanded administrative payment thereof; that the Insurance Claims Council on October 27, 1931, rendered a decision that the insured for insurance purposes was not permanently and totally disabled as alleged but that he was so disabled from June 10, 1924; that Henry Lawson was notified by letter dated October 30, 1931, from H. L. McCoy, Director of Insurance, of the decision of the Insurance Claims Council and further informed that "The claimant may appeal from the decision to the Administrator of Veterans Affairs by giving notice in writing to this office within 60 days from the date of this letter. If claim is not appealed within the time limit, the Council's decision will be referred for approval of the Administrator of Veterans Affairs;" that on March 5, 1932, Bacon R. Moore, the original attorney for the plaintiffs, addressed a communication to the Veterans Administration, which was received on March 8, 1932, requiring to be advised whether the Administrator had approved the decision of the Insurance Claims Council so that suit could be filed; that Henry Lawson was notified by letter dated March 15, 1932, from H. L. McCoy, Director of Insurance, that the Insurance Claims Council rendered a decision on October 27, 1931, to the effect that the evidence was not sufficient to establish as a fact that the insured was permanently and totally disabled at a time when the contract of insurance was in force and that therefore his claim had been denied, that such denial may be considered final for the purposes of instituting suit under Section 19 of the World War Veterans' Act, 1924, as amended; that this action was commenced on March 30, 1932, alleging that the insured became permanently and totally disabled while said insurance contract was in force; that thereafter on the 12th day of June, 1939, an amended complaint was filed

alleging revival of the insurance under Section 305, World War Veterans' Act, 1924, as amended, by reason of the death of the insured on October 5, 1924.

6. That a disagreement as to plaintiffs' claim for insurance benefits herein against the defendant exists.

Conclusions of Law.

1. That the Court has jurisdiction of the parties and of the subject matter of this action.

2. That no insurance was revived when the insured became totally permanently disabled on June 10, 1924, because he was not then entitled to any uncollected compensation.

3. That the compensation in the amount of $128.40, which accrued subsequent to June 10, 1924, and which was due and payable to the insured at the time of his death on October 5, 1924, was applicable to revive insurance under the provisions of Section 305 of the World War Veterans' Act (38 U. S. C. 516).

4. That upon the death of the insured on October 5, 1924, a portion of his war risk term insurance which lapsed for nonpayment of the premium due on June 1, 1919, was revived in the amount which could have been kept in force by the application of $128.40 to the payment of premiums from June 1, 1919, to October 5, 1924, less the amount of such premiums with interest thereon, as provided by Section 305 of the World War Veterans' Act to October 5, 1924.

5. That John A. Polin, Administrator of the Estate of Henry Lawson, is entitled to 138 installments of the insurance revived upon the death of Hobart Lawson, for the period from October 5, 1924 to March 21, 1936, the date of the death of Henry Lawson.

6. That the plaintiff, Pearlie Lawson, Administratrix of the Estate of Hobart Lawson is entitled to the commuted value of 102 installments of insurance which had not accrued when Henry Lawson, the designated beneficiary, died on March 21, 1936.

7. That the attorneys for the plaintiff are entitled to a reasonable fee for their services herein.

H. CHURCH FORD,
Judge.

JUDGMENT—Entered and filed June 28, 1940.

This cause coming on for trial and trial by jury having been specifically waived by agreement of counsel, and having been submitted to the Court for Findings of Fact, Conclusions of Law, and Judgment, and the Court being advised,

IT IS NOW CONSIDERED, ORDERED, AND ADJUDGED that upon the death of the insured on October 5, 1924, a portion of his war risk term insurance which lapsed for nonpayment of premium due on June 1, 1919, was revived in the amount which could have been kept in force by the application of $128.40 to the payment of premiums from June 1, 1919, to October 5, 1924, less the amount of such premiums with interest thereon, as provided by Section 305 of the World War Veterans' Act, to October 5, 1924.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that the plaintiff, John A. Polin, Administrator of the Estate of Henry Lawson, recover 138 installments, each in the sum of $16.50, of the insurance revived upon the death of Hobart Lawson, for the period from October 5, 1924, to March 21, 1936, or a total sum of $2,277.00.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Pearlie Lawson, Administratrix of the

Estate of Hobart Lawson, recover the sum of $1,462.00 the commuted value of the remaining 102 installments of insurance accrued after Henry Lawson, the designated beneficiary, died on March 21, 1936.

IT IS FURTHER ORDERED AND ADJUDGED that Blakey Helm, attorney for the plaintiffs, be paid 10 per cent of the amounts ordered paid by this judgment, to be deducted from the respective amounts paid to the plaintiff.

/S/ H. Church Ford,
Judge.

ORDER—Entered and filed Sept. 23, 1940.

Came the defendant, United States of America, by John T. Metcalf, United States Attorney for the Eastern District of Kentucky, and offered for filing his Notice of Appeal to the Circuit Court of Appeals for the Sixth Circuit, and the Court being advised, it is ordered that the said Notice of Appeal to the Circuit Court of Appeals for the Sixth Circuit be, and it is hereby filed and noted of record, and the defendant is given ninety days from the date hereof within which to file the record on appeal.

/S/ H. Church Ford,
Judge.

September 23, 1940.

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS—Filed September 23, 1940.

Notice is hereby given that the defendant, United States of America, above named, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit from the final Judgment entered in this action on June 28, 1940.

JOHN T. METCALF,

United States Attorney, Eastern District of Kentucky, Attorney for Defendant, Lexington, Kentucky.

ORDER—Entered and filed Sept. 23, 1940.

Came the defendant, United States of America, by John T. Metcalf, United States Attorney for the Eastern District of Kentucky, and offered for filing Designation of Contents of Record on Appeal, and the Court being advised, it is ordered that said Designation of Contents of Record on Appeal be and the same is hereby filed and noted of record.

H. CHURCH FORD,

Judge.

September 23, 1940.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed September 23, 1940.

The Clerk of this Court is requested to prepare, authenticate, and file in the office of the Clerk of the United States Circuit Court of Appeals, Sixth Circuit, a transcript of the record herein for use in the appeal of this case by the defendant herein, and appellant in the Circuit Court of Appeals, containing the following:

1. Petition, filed herein March 30, 1932.

2. Answer of United States of August 31, 1933.

3. Amended Petition of July 13, 1934.

4. Order filing Answer to Amended Petition, entered January 11, 1937.

5. Answer to Amended Petition of January 11, 1937.

6. Order filing Amended Answer to Petition and Petition as Amended, entered June 22, 1937.

7. Amended Answer of United States to Petition and Petition as Amended, of June 22, 1937.

8. Order filing an Amendment to the Petition, entered June 12, 1939.

9. Amendment to Petition, of June 12, 1939.

10. Order filing Answer of the United States to Plaintiffs' Amended Complaint, entered July 11, 1939.

11. Answer of United States to Plaintiffs' Amended Complaint of July 11, 1939.

12. Order filing Stipulation of Facts and submitting cause to Court for Findings and Judgment upon the facts as stipulated, entered November 28, 1939.

13. Stipulation of Facts, filed November 28, 1939, together with the three exhibits attached thereto.

14. Findings of Fact and Conclusions of Law, entered June 28, 1940.

15. Judgment, entered June 28, 1940.

16. Notice of Appeal.

17. Order filing Notice of Appeal.

18. Designation of Contents of Record on Appeal.

19. Order filing Designation of Contents of Record on Appeal.

JOHN T. METCALF,

United States Attorney, Eastern District of Kentucky, Attorney for Defendant.

CERTIFICATE OF CLERK OF DISTRICT COURT.

United States of America, Eastern District of Kentucky, ss:

I, A. B. Rouse, Clerk of the United States District Court in and for the Eastern District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original Record as per designation filed September 23, 1940 in the case of Pearlie Lawson, Administratrix of the estate of Hobart Lawson and Henry Lawson, beneficiary vs. United States of America,

No. U. S. 140—Lexington Docket, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Lexington this 30 day of October, A. D. 1940.

A. B. Rouse, Clerk.

(SEAL)

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

* * * * *

Cause argued and submitted

(January 10, 1942)

Before HICKS, ALLEN, and MCALLISTER, JJ.

This cause is argued by Wilbur C. Pickett for Appellant and by Blakey Helm for Appellees and is submitted to the court.

Judgment

(Entered January 12, 1942)

This cause was heard on the transcript of the record, briefs and arguments of counsel, and

On consideration whereof, it is here and now ordered and adjudged that the judgment appealed from be and the same is in all things affirmed upon the authority of American National Bank & Trust Co. of Chicago, Admr., etc. v. The United States of America, C. C. A. 7, decided December 13, 1941.

United States Circuit Court of Appeals for the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of United States of America vs. Pearlie Lawson, Admx. of the Estate of Hobart Lawson, Deceased, and John A. Polin, Administrator of the Estate of Henry Lawson, Beneficiary, Deceased. No. 8847. As the same remains upon the files and records of the said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 6th day of March, A. D. 1942.

J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

448809—42

U. S. GOVERNMENT PRINTING OFFICE: 1942

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1038

THE UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, ADMINISTRATOR, ETC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above-entitled case on December 13, 1941.

OPINIONS BELOW

The District Court for the Northern District of Illinois rendered no opinion. The opinion of the Circuit Court of Appeals is reported in 124 F. (2d) 743.

449386—42

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 13, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether compensation accruing to a World War veteran after he has become totally permanently disabled may be used under the provisions of Section 305 of the World War Veterans' Act to revive his lapsed war risk term insurance where such compensation was uncollected on the date of the death of the veteran.

An incidental question presented is—

Whether the fact that no issue was raised between the Government and an insured during his lifetime as to whether he was totally permanently disabled, precludes a defense to a claim for the revival of lapsed insurance under Section 305 that the insured became totally permanently disabled at a time when no compensation was due him.

STATUTES INVOLVED

Section 305 of the World War Veterans' Act of June 7, 1924, as amended, as contained in 38 U. S. C. 516, provides in part:

> Where any person has heretofore allowed his insurance to lapse, or has canceled or reduced all or any part of such insurance,

> while suffering from a compensable disability for which compensation was not collected and dies or has died, or becomes or has become permanently and totally disabled and at the time of such death or permanent total disability was or is entitled to compensation remaining uncollected, then and in that event so much of his insurance as said uncollected compensation, computed in all cases at the rate provided by section 302 of the War Risk Insurance Act, as amended by Act December 24, 1919, ch. 16, 41 Stat. 371 would purchase if applied as premiums when due, shall not be considered as lapsed, canceled, or reduced; and the Veterans' Administration is hereby authorized and directed to pay to said soldier, or his beneficiaries, as the case may be, the amount of said insurance less the unpaid premiums and interest thereon at 5 per centum per annum compounded annually in installments as provided by law. * * *

Other pertinent statutory provisions, together with a letter from the Administrator of Veterans' Affairs to the then Solicitor General, dated January 14, 1941, appear in the Appendix to the Government's petition for a writ of certiorari (pp. 18–25) in *United States* v. *Florian*, 312 U. S. 656.[1] Printed in the Appendix hereto (*infra*, pp.

[1] For the convenience of the Court, nine copies of the *Florian* petition have been filed with the Clerk. Copies are being furnished counsel.

12–14) is a letter from the Administrator to the present Solicitor General, dated February 16, 1942.

STATEMENT

This suit was originally brought March 7, 1932, in the District Court of the United States for the Northern District of Illinois to recover death benefits under a $10,000 contract of war risk term insurance issued to Robert Bruce Miller during the period of his military service, which ended in September 1919 (R. 2–5).

Miller died February 17, 1921 (R. 2, 24). The beneficiary named in his insurance contract died December 27, 1929 (R. 3, 24). In an additional count (R. 24–28), incorporated by amendment, the respondent, American National Bank and Trust Company of Chicago, as administrator *de bonis non* of the insured's estate and as administrator of the beneficiary's estate, sought recovery of the death benefits on the ground that the insurance, which lapsed in 1919, was revived and matured in favor of the beneficiary under Section 305, World War Veterans' Act, as amended, upon the death of the insured. The count alleged that the insured was suffering from a compensable disability at the time of his discharge from the service in 1919 for which compensation was not collected by him until some time thereafter, and that, at the time of his death on February 17, 1921, there was more than enough com-

pensation uncollected to purchase the full amount of the insurance granted him, if applied to the payment of premiums when due (R. 25).

The Government in its answer to this count (R. 29–30) alleged as an affirmative defense that the insured became totally permanently disabled on December 21, 1920, at a time when he was not entitled to any uncollected compensation (R. 30). Respondent moved to strike this affirmative allegation in the answer and also for summary judgment on the additional count (R. 31).

The District Court ordered the allegation stricken (R. 32) and entered judgment for respondent (R. 35–36), thus holding, in effect, that the insurance was revived and matured under Section 305 on the date of the insured's death, by compensation due and uncollected on that date, although none of such compensation accrued until after the insured became totally permanently disabled.[2]

A motion by the Government to set aside the judgment and to grant a new trial was denied (R. 36, 38) and the Government appealed (R. 39–40). The Circuit Court of Appeals for the Seventh Circuit affirmed.

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[2] Cf. the court's findings of fact and conclusions of law (R. 33–34). The same District Court had ruled in the Government's favor upon the identical question in the earlier *Florian* case but the Circuit Court of Appeals for the Seventh Circuit had reversed that ruling.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that compensation accruing to a World War veteran, after he has become totally permanently disabled, may be used under the provisions of Section 305 of the World War Veterans' Act to revive his lapsed war-risk term insurance.

2. In holding that a right to insurance benefits under Section 305 may arise upon the death of an insured who had previously become totally permanently disabled at a time when no disability compensation was due him.

3. In holding that the Government may be precluded from asserting that an insured became totally and permanently disabled at a time when no disability compensation was due him, if no issue as to his disability was raised by or with the Government until after his death.

4. In overturning a consistent and long-established administrative practice not clearly erroneous.

5. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. This case, as the court below stated, presents the precise question which that court decided against the Government in *Florian* v. *United States,* 114 F. (2d) 990. In that case this Court granted a petition for a writ of certiorari by the

Government, but found it unnecessary to decide the question because of the lack of a final appealable judgment by the District Court. *United States* v. *Florian*, 312 U. S. 656.[3]

2. In its petition in the *Florian* case (pp. 9, 15), the Government pointed out that the court's decision of the question is opposed to the long-continued, consistent administrative practice of the Veterans' Administration and its predecessor, the Veterans Bureau, and that, if allowed to stand, it would greatly increase the liability of the Government under Section 305 of the World War Veterans' Act (*supra*, pp. 2–3), probably by many millions of dollars. See letter of the Administrator of Veterans' Affairs to the then Solicitor General, dated January 14, 1941, copied at pages 22–25 of the *Florian* petition, and also a letter from the Administrator of Veterans' Affairs to the present Solicitor General, dated February 16, 1942, printed in the Appendix hereto (*infra*, pp. 12–14).

3. (a) In the *Florian* petition the Government recited at some length (pp. 9–13) the considerations which led it to conclude that the decision of the Circuit Court of Appeals could not be harmonized with the provisions and purposes of the insurance contract and of the statute under which it was issued, or with the purpose of Sec-

[3] While the Government in its petition expressed doubt as to the finality of the District Court judgment (Pet. 17), certiorari was sought on the grounds hereinafter stated.

tion 305 itself, as these contractual and statutory provisions have been judicially interpreted. It would seem unnecessary to repeat those considerations here.

(b) The *Florian* petition (pp. 13–15) also makes it clear, we think, that the Government may not be regarded as having acted belatedly or arbitrarily in making a finding of total permanent disability after the death of the insured in a case like the present one.[4]

(c) The court below apparently concludes in its present opinion that the Government's interpretation of Section 305 would have the effect of avoiding a revival of insurance for which provision had been made in earlier legislation, and refers to the legislative history as evincing a liberalizing intention only. The court has erroneously construed the earlier legislation. The 1921

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[4] It may be pointed out additionally that respondent's own allegations in the additional count (R. 26) justify the conclusion that the claim which resulted in the finding of total permanent disability was not filed until shortly prior to July 3, 1931—more than ten years after the insured's death—and that the finding was made within only a little more than five months later.

Ordinarily at least it is only by reason of a posthumous rating of total permanent disability that compensation accruing after total permanent disability may be said to have been due and uncollected at death. Certainly it is not arbitrary for the Government to insist that if a posthumous rating of total permanent disability is to be employed in claims against the Government, the Government has the right to assert that such disability did in fact exist.

amendment revived insurance only in those cases in which the veteran had *died* "without collecting or making claim" for the compensation due him when his insurance lapsed The 1923 amendment provided for revival also in those cases in which the insured had become *totally permanently disabled* "without collecting" the compensation due at lapse.[5] Of course, compensation due at lapse and uncollected at death would likewise be uncollected at the date of total permanent disability (if the insured became so disabled), so that the Government's interpretation could not possibly have the effect of avoiding the revival of insurance in any case in which the insurance would have been revived under earlier legislation.

The present question arises because the subsequent legislation embodied in Section 305 of the World War Veterans' Act eliminated the requirement that the compensation uncollected on the date as of which the insurance would have matured, if it had not lapsed, be the same compensation as that uncollected at lapse. (See 34 Op. A. G. 369.) The obvious reason for the elimination of this requirement was the recognition of the fact

[5] The 1921 amendment had been offered from the floor of the House and was inconsistent with the provisions of the contracts to which it related in that it ignored the fact that total permanent disability was as much insured against as death. The inconsistency was recognized at the time of the 1923 amendment by the member of the House who reported the amendment (64 Cong. Rec., Pt. 5, p. 5195).

that compensation due at death or total permanent disability might have been used to reinstate the lapsed insurance if it had been promptly paid.

(d) *United States* v. *McClure,* 305 U. S. 472, to which the court refers in its present opinion, related solely to the question whether Section 301, World War Veterans' Act, limiting the continuance of yearly renewable term insurance to July 2, 1927, prevented the revival of such insurance after July 2, 1927. This Court held that Section 301 had no such general application, pointing out that Section 304 contained an express provision limiting reinstatement of insurance to July 2, 1927, but that Section 305 contained no such express provision limiting revival. There is nothing in the *McClure* opinion to justify the statement of the court below that in the *McClure* case the "veteran could not have reinstated such lapsed insurance during his lifetime." Actually McClure could have reinstated at any time between August 9, 1921,[6] and July 2, 1927, but may have been prevented from doing so by the noncollection of compensation due him at all times during that period. The fact that he could not have reinstated after July 2, 1927, did not alter the fact, possibly regarded by this Court as controlling, that he may have been prevented from

[6] The date of the first legislative provision for the reinstatement of insurance by a disabled veteran (c. 57, 42 Stat. 147, 156–157).

continuing his insurance without lapse or reinstating it prior to that time by the noncollection of the compensation due him. In the instant case, on the contrary, the veteran collected all compensation which he might possibly have employed to continue or reinstate his insurance.

CONCLUSION

For the reasons indicated herein and elaborated in the Government's petition in the *Florian* case, it is respectfully submitted that this petition for a writ of certiorari should be granted.[7]

CHARLES FAHY,
Solicitor General.

MARCH 1942.

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[7] A petition for a writ of certiorari is being filed simultaneously in the companion case of *United States* v. *Anna Shepanek, Individually and as Administratrix of the Estate of William Babicz, also known as William LaValley*, No. 1039, involving the same questions and similarly decided by the court below on the authority of its decision in the instant case. A petition for a writ of certiorari is also being filed in *United States* v. *Pearlie Lawson, Administratrix of the Estate of Hobart Lawson, Deceased, and John A. Polin, Administrator of the Estate of Henry Lawson, Beneficiary, Deceased*, 124 F. (2d) 1020 (C. C. A. 6), to review a similar decision rendered *per curiam* upon the same authority by the Circuit Court of Appeals for the Sixth Circuit on January 15, 1942.

APPENDIX

Letter from the Administrator of Veterans' Affairs to the Solicitor General:

Office of
The Administrator of
Veterans' Affairs

VETERANS' ADMINISTRATION,
Washington, February 16, 1942.

Honorable CHARLES FAHY,
The Solicitor General, Department of Justice, Washington, D. C.

MY DEAR MR. SOLICITOR GENERAL: I have your letter of January 19, 1942, transmitting copies of opinions of the Circuit Court of Appeals for the Seventh Circuit entered December 13, 1941, in the cases of *American National Bank and Trust Co. of Chicago, Administrator, Etc.* v. *United States,* and *Anna Shepanek, Individually and as Administratrix of the Estate of William Babicz, also known as William LaValley* v. *United States.* I note that these decisions completely repudiate the administrative interpretation of Section 305 with respect to the question presented in those cases, whereas in *Florian* v. *United States,* 114 F. 2d 990 (C. C. A. 7th), presenting the same question, but reversed on another point, the court had observed that "there would be merit in the Government's position" except for certain facts which were deemed decisive against the Government's position in that particular case.

The repudiation of the administrative interpretation and practice followed consistently since the enactment of the provisions

for the revival of insurance embodied in Section 408, War Risk Insurance Act, and Section 305, World War Veterans' Act, render the recent decisions of far-reaching importance. The reasoning of the decisions is wholly inconsistent with the basis upon which all like cases have been adjudicated heretofore, and casts a doubt upon the validity of such adjudications. Review of the adjudicated cases would present a formidable administrative task and give rise to numerous legal questions as to which the validity of the precedents has now been rendered uncertain. Likewise, in future cases, in the light of the principle established by the Supreme Court in the case of *United States* v. *McClure,* 305 U. S. 472, the view of the Circuit Court would result in greatly increased liability. The potential cost to the Government may be conservatively estimated as many millions of dollars.

More than four million contracts of yearly renewable term insurance were issued and the vast majority of them lapsed when the insureds were discharged from military or naval service. Claims for compensation have been filed in approximately one and three-quarter million cases. The first condition of Section 305 is met in the vast majority of cases in which compensation was awarded from the date of the insured's separation from service since claims were rarely made or, if made, were rarely carried to the point of actual payment of compensation prior to the lapse of insurance for nonpayment of the premium due immediately after separation from service. Thus the first condition of Section 305 is met in a very large number of cases, and

inevitably the number of cases is also large in which death has occurred or will occur at a time when compensation is uncollected by virtue of posthumous ratings of total permanent disability and for other reasons while all compensation due had been collected in full on the date of total permanent disability.

I wish to express the earnest hope that every effort will be exerted to obtain a decision by the Supreme Court of the United States upon the question involved in these cases. I am convinced the administrative practice developed concurrently with the developing legislation, embodying as it did specific recommendations made by me and my predecessor, is consistent with the contemporaneous thought of the Congress and the intent of the law.

Very truly yours,

(Sgd.) FRANK T. HINES,
Frank T. Hines,
Administrator.

U. S. GOVERNMENT PRINTING OFFICE: 1942

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450389—42

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. —

THE UNITED STATES OF AMERICA, PETITIONER

v.

PEARLIE LAWSON, ADMINISTRATRIX OF THE ESTATE OF HOBART LAWSON, DECEASED, AND JOHN A. POLIN, ADMINISTRATOR OF THE ESTATE OF HENRY LAWSON, BENEFICIARY, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above-entitled case on January 12, 1942.

OPINIONS BELOW

The District Court for the Eastern District of Kentucky rendered no opinion. The *per curiam* order of the Circuit Court of Appeals (R. 45) is reported in 124 F. (2d) 1020.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 12, 1942 (R. 45). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether compensation accruing to a World War veteran after he has become totally permanently disabled may be used under the provisions of Section 305 of the World War Veterans' Act to revive his lapsed war risk term insurance where such compensation was uncollected on the date of the death of the veteran.

An incidental question presented is—

Whether the fact that no issue was raised between the Government and an insured during his lifetime as to whether he was totally permanently disabled precludes a defense to a claim for the revival of lapsed insurance under Section 305 that the insured became totally permanently disabled at a time when no compensation was due him.

STATUTES INVOLVED

Section 305 of the World War Veterans' Act, as amended, will be found in the petition for a writ of certiorari in *The United States of America* v. *American National Bank and Trust Company of Chicago, Administrator, etc.*, No. 1038, present Term, filed March 13, 1942. A letter from

the Administrator of Veterans' Affairs to the Solicitor General, dated February 16, 1942, appears in the Appendix to that petition (pp. 12–14). The other pertinent statutory provisions and a letter from the Administrator of Veterans' Affairs to the then Solicitor General, dated January 14, 1941, appear in the Appendix to the Government's petition for a writ of certiorari (pp. 18–25) in *United States* v. *Florian,* 312 U. S. 656, nine copies of which have been filed with the petition in the *American National Bank and Trust Company* case for the convenience of the Court.

STATEMENT

This suit on a $10,000 policy of war risk term insurance was brought March 30, 1932, in the United States District Court for the Eastern District of Kentucky by respondent Pearlie Lawson, as administratrix of the estate of Hobart Lawson, deceased, and Henry Lawson, as the beneficiary of the policy (R. 1–5). Henry Lawson died and respondent John A. Polin, as administrator of his estate, was substituted as a party-plaintiff (R. 15–16). In an amendment to the petition (R. 15–17) the respondents sought benefits on the basis of an alleged revival of part of the insurance under Section 305, World War Veterans' Act, upon the death of the insured.

The case was tried before the court, without a jury (R. 20), upon a stipulation of facts (R. 20–31) which recited in effect that the insurance

lapsed June 1, 1919, while the insured was suffering from a compensable disability for which compensation was then uncollected (R. 21), and that on the date of his death, October 5, 1924 (R. 24), he was entitled to compensation remaining uncollected[1] (R. 25–26). It was further stipulated, however, that the insured became totally permanently disabled on June 10, 1924 (R. 24), that on that date he was not entitled to any uncollected compensation (R. 25), and that it was never the practice of the Veterans' Administration or its predecessors to use compensation, accruing after an insured became totally permanently disabled, to revive insurance under Section 305 upon the death of the insured (R. 26, 27–28, 30–31).[2]

The District Court made findings of fact (R. 36–38) substantially in accord with the stipulation and conclusions of law (R. 38) to the effect, *inter alia*, that the compensation remaining uncollected on the date of the insured's death (all of which accrued subsequent to the date of total permanent disability) was applicable to revive part of his insurance on the date of his death (R. 38).

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[1] Compensation in the amount of $128.40 was awarded upon an administrative rating of total permanent disability from June 10, 1924, which was made March 6, 1925, after the insured's death (R. 23–24, 25–26).

[2] It was also stipulated that a claim for insurance benefits was filed in the Veterans Administration June 9, 1931, and was denied October 27, 1931 (R. 24–25).

Judgment was accordingly entered, awarding insurance benefits to the respondents (R. 39–40). The Government appealed (R. 41). The Circuit Court of Appeals for the Sixth Circuit affirmed *per curiam* (R. 45) upon the authority of *American Nat. Bank & Trust Co.* v. *United States,* 124 F. (2d) 743 (C. C. A. 7), review of which, as previously stated, has been sought by the Government in a petition (No. 1038) filed March 13, 1942.[3]

SPECIFICATION OF ERRORS TO BE URGED

The errors to be urged are identical with those specified in the Government's petition for a writ of certiorari in *The United States of America* v. *American National Bank and Trust Company of Chicago, Administrator, etc.,* No. 1038.

REASONS FOR GRANTING THE WRIT

The present petition should be granted for the reasons set forth in the Government's petition for a writ of certiorari in *The United States of America* v. *American National Bank and Trust Com-*

[3] Simultaneously with the petition in the *American Nat. Bank & Trust Co.* case, the Government filed a petition for a writ of certiorari in the companion case of *The United States of America* v. *Anna Shepanek, Individually and as Administratrix of the Estate of William Babicz, also known as William La Valley,* No. 1039, involving the same questions and similarly decided by the Circuit Court of Appeals for the Seventh Circuit on the authority of its decision in the *American Nat. Bank & Trust Co.* case.

pany of Chicago, Administrator, etc., No. 1038, and more fully elaborated in the Government's petition for a writ of certiorari in *United States* v. *Florian*, 312 U. S. 656.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

MARCH 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

FILED
APR 15 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1090.

THE UNITED STATES OF AMERICA, - - Petitioner,

versus

PEARLIE LAWSON, Administratrix of the Estate of Hobart Lawson, Deceased, and
JOHN A. POLIN, Administrator of the Estate of Henry Lawson, Beneficiary, Deceased, - Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

BLAKEY HELM,
Attorney for Respondents.

JOHN C. DOOLAN,
THOMAS J. WOOD,
NELSON HELM,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1090.

THE UNITED STATES OF AMERICA, - - *Petitioner,*

v.

PEARLIE LAWSON, ADMINISTRATRIX OF THE ESTATE OF HOBART LAWSON, DECEASED, AND JOHN A. POLIN, ADMINISTRATOR OF THE ESTATE OF HENRY LAWSON, BENEFICIARY, DECEASED, - - - - - *Respondents.*

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

As stated in petition.

JURISDICTION.

As stated in petition.

QUESTIONS PRESENTED.

As stated in petition.

Neither of the questions stated is included under any of the approved grounds mentioned in Rule 38, and neither presents any question of great importance. The questions presented have been answered in the same way by the Court of Appeals of the Sixth Circuit (this case, reported 124 Fed. (2d) 1020) and by the Court of Appeals of the Seventh Circuit, in United States v. American National Bank & Trust Co., etc., 124 Fed. (2d) 743.

STATUTES INVOLVED.

The only statute involved in this action is Section 305, World War Veterans' Act, as amended (U. S. C. A., Title 38, §516). This statute specifically provides for the insurance involved in the following words:

> "Where any person has heretofore allowed his insurance to lapse, * * * while suffering from a compensable disability for which compensation was not collected and dies or has died * * * and at the time of such death * * * was or is entitled to compensation remaining uncollected, then and in that event so much of his insurance as said uncollected compensation, * * * would purchase if applied as premiums when due, shall not be considered as lapsed * * *."

STATEMENT.

The statement in the petition is sufficient.

ARGUMENT.

I.

Petitioner refers to its petition in Docket No. 1038, U. S. of America v. American National Bank & Trust Co., etc., for the specifications of error. Its first specification claims some difference between compensation accruing after existence of permanent total disability and compensation accruing theretofore. Section 305 makes no such distinction but merely authorizes maturity of the insurance where "entitled to compensation remaining uncollected."

II.

The second specification is based upon a claim that death is eliminated as a basis for maturing revived insurance, when the insurance might have matured on a previous basis of maturity. The statute authorizes maturing of such revived insurance when the insured "dies or has died, or becomes or has become permanently and totally disabled." The statute now provides for alternate contingencies for maturing insurance; it makes no provision for either being the exclusive ground. Revived insurance was first authorized only in case of death (42 Stats. 156).

III.

The third specification excepts to a holding precluding the Government from claiming existence of total permanent disability. No such holding appears in this case. The statute includes no reference to an excuse from liability if either contingency for maturing the insurance exists.

IV.

The fourth specification claims this decision overturns a long established custom. There is *no finding of fact* or *conclusion of law supporting such custom.* With the stipulation of facts was filed a letter with reference to an administrative interpretation in the Veterans Administration with reference to the maturing of insurance. Neither the stipulation of facts nor the letter shows that the administrative interpretation had been followed in any case. The letter dated August 28, 1939, from the Administrator of Veterans Affairs does not cite a single case involving such a decision.

There is no showing in this case of any consistent or long established administrative practice, and this question had not arisen in any reported cases until the case of Florian v. U. S., 114 Fed. (2d) 990. Furthermore, the so-called administrative interpretation squarely conflicts with the Act and hence is clearly erroneous.

V.

The judgment of the District Court applied specifically the statute according to its provisions. The Circuit Court of Appeals recognized that this application of the statute, specifically followed its wording and intent. The petitioner asks the court to write into the statute provisions for eliminating liability in one of the alternate contingencies, while the statute provides for liability on either of the alternate bases for maturing the insurance.

CONCLUSION.

Section 305 is clear. The interpretation given by the Circuit Court of Appeals directly follows it. The decision concurs with the interpretation given by the Court of Appeals for the Seventh Circuit. There is no conflict between courts. The petition should be denied.

BLAKEY HELM,
Attorney for Respondents.

JOHN C. DOOLAN,
THOMAS J. WOOD,
NELSON HELM,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 705

UNITED STATES OF AMERICA, PETITIONER

v.

HARRY FLORIAN, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ANTON FLORIAN, DECEASED BENEFICIARY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above entitled case October 16, 1940.

OPINIONS BELOW

The District Court for the Northern District of Illinois rendered no opinion. The opinion of the Circuit Court of Appeals in dismissing the appeal (R. 39–43) and its opinion in revoking the judgment of dismissal and reversing on the merits (R. 47–51) are reported in 114 F. (2d) 990.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 16, 1940 (R. 51). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether compensation accruing to a World War veteran after he has become totally permanently disabled may be used under the provisions of Section 305 of the World War Veterans' Act to revive his lapsed war risk term insurance where such compensation was uncollected on the date of the death of the veteran.

2. Whether the fact that no issue was raised between the Government and an insured during his lifetime as to whether he was totally permanently disabled, precludes a defense to a claim for the revival of lapsed insurance under Section 305 that the insured became totally permanently disabled at a time when no compensation was due him.

3. Whether an order denying a recovery under one of several counts upon a single war risk insurance contract is appealable where it recites that the "other counts remain for disposition."

STATUTES INVOLVED

Section 305 of the World War Veterans' Act, June 7, 1924, as amended, as contained in U. S. C., Title 38, Section 516, provides, in part:

> Where any person has heretofore allowed his insurance to lapse, or has canceled or reduced all or any part of such insurance, while suffering from a compensable disability for which compensation was not collected and dies or has died, or becomes or has become permanently and totally disabled and at the time of such death or permanent total disability was or is entitled to compensation remaining uncollected, then and in that event so much of his insurance as said uncollected compensation, computed in all cases at the rate provided by section 302 of the War Risk Insurance Act, as amended December 24, 1919, would purchase if applied as premiums when due, shall not be considered as lapsed, canceled, or reduced; and the Veterans' Administration is hereby authorized and directed to pay to said soldier, or his beneficiaries, as the case may be, the amount of said insurance less the unpaid premiums and interest thereon at 5 per centum per annum compounded annually in installments as provided by law.

Other pertinent statutes, together with a bulletin of the Treasury Department, and a letter from the Administrator of Veterans' Affairs to the Solicitor General, appear in the Appendix, *infra*, pp. 18–25.

STATEMENT

This suit was originally brought in the District Court of the United States for the Northern District of Illinois by Anton Florian, the beneficiary under a

$10,000 war risk term insurance contract issued to his son, William G. Florian, to recover benefits under the contract (R. 2–5). The plaintiff died and the respondent, Harry Florian, as executor of Anton Florian, was substituted as party-plaintiff (R. 24). The petition, as amended (R. 9–14), and an additional count (R. 14–18), contained claims for insurance benefits based on three inconsistent grounds. Those alleged in the amended petition were (1) that William G. Florian, the insured, was totally and permanently disabled on May 20, 1919, while his insurance was in force by premium payments (R. 12), and (2) that on an unspecified date, after the insurance lapsed in 1919, he became totally and permanently disabled under conditions which revived and matured his insurance by operation of Section 305 of the World War Veterans' Act (R. 11). The ground of the third, or additional count, was that the insurance was revived and matured under Section 305 upon the death of the insured on May 21, 1924 (R. 14, 17), no mention being made of total permanent disability.

The Government answered, denying the material allegations in the amended petition, except those relating to the issuance of the insurance (R. 19–20), and, as to the additional count, alleged, *inter alia,* that the insured became totally and permanently disabled on or before October 22, 1923, at a time when he was not entitled to any disability compensation, and that the compensation which

accrued thereafter and remained uncollected at the time of his death was inapplicable to revive the insurance (R. 21).

Respondent moved to strike these allegations in the answer to the additional count, and also moved for a summary judgment under that count (R. 25).[1] The District Court entered an order denying both motions (R. 25–28) after considering stipulations of the parties and evidence offered at the hearing on the motions (R. 25). The court, in an amended order (R. 32–33), expressly reserved for future determination upon evidence to be adduced the issue as to whether the insured became totally permanently disabled in October 1923, as alleged by the Government.[2] The plaintiff excepted to the order of the District Court (R. 33) and took an appeal therefrom (R. 34).

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[1] No question as to whether the insured was totally permanently disabled on the date alleged by the Government is now presented since the fact was, of course, necessarily conceded for the purposes of the respondent's motions to strike and for summary judgment, and hence must be taken as true for all present purposes.

[2] The court made findings of fact (R. 25–28) substantially in accord with the facts alleged or admitted in the answer to the additional count, except that it made no finding with respect to the allegation that insured became permanently totally disabled for insurance purposes in October 1923, at a time when he was not entitled to any disability compensation. These findings included a finding (R. 27) that in August 1932 an agency of the Veterans' Administration had made an administrative determination that the insured became totally and permanently disabled in October 1923.

The Circuit Court of Appeals dismissed the appeal on motion of the Government, on the ground that it lacked jurisdiction because the order appealed from was not a final decision nor the kind of interlocutory order from which an appeal would lie. The court, however, in its opinion, expressed the view that upon further proceedings in the District Court a final order appealable by the respondent might be entered as to the additional count without disposing of the other counts (R. 39–43).

Shortly after this decision of the Circuit Court of Appeals, the District Court, on motion of the respondent, entered an order purporting to correct its original order *nunc pro tunc* to recite, in effect, that respondent elected to "stand by" his motions, and that the court thereupon found the issues as to the additional count in favor of the Government, and directed that the suit be dismissed as to that count only, and that the other counts "remain for disposition" (R. 45–46). A certified copy of this order was filed in the Circuit Court of Appeals pursuant to a stipulation that it might be included in the record on appeal (R. 44–45). Respondent thereupon filed in the Circuit Court of Appeals a petition for rehearing (R. 46). The Government filed an answer to this petition (R. 46–47).[3]

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[3] The answer, not copied in the record, was a joinder in the respondent's petition for rehearing and a petition that in any event the previous opinion be modified. The position of the Government in this answer, not fully reflected in the court's subsequent opinion (R. 48), was that no appealable

The Circuit Court of Appeals thereupon vacated its order dismissing the appeal and denied a rehearing (R. 47), and, without modifying its former opinion,[4] reversed the "orders or judgments" of the District Court with directions to enter judgment for respondent (R. 51). The court expressed the view in its opinion (R. 49–50) that "there would be merit" in the Government's defense—that compensation accruing to a veteran after he has become totally permanently disabled may not be used to revive his insurance under Section 305—if an administrative adjudication that the insured became totally and permanently disabled on October 22, 1923, had been made before his death or if he himself had claimed such disability. The court held, however, that such a defense would not lie under "any reasonable construction of the Act," where, as here, no such claim has been made by the insured or by his personal representatives and no issue had been made by the Government with respect to his physical condition on the date in question until long after his death. The court suggested that, although the fact is not controlling, it would be difficult for a beneficiary after the

judgment could be entered upon the additional count unless it constituted a final disposition of the entire case, that the court had erred in its previous opinion in expressing the view that an appealable order could be entered upon the additional count without disposing of the remaining counts, and that the previous opinion should be modified in this respect.

[4] See footnote 3, *supra*.

death of the veteran to meet a contention by the Government that he was totally permanently disabled and, hence, that it would be unfair for the Government to make this defense unless the veteran had claimed, or the Government had found during his lifetime, that he was so disabled. Conceding in its opinion that there were no cases in point, the court relied upon *United States* v. *Ellison,* 74 F. (2d) 864 (C. C. A. 4th), certiorari denied, 295 U. S. 750, and *United States* v. *Sellers,* 75 F. (2d) 623 (C. C. A. 5th), certiorari denied, 295 U. S. 763, as supporting its holding by analogy.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that compensation accruing to a World War veteran, after he has become totally permanently disabled, may be used under the provisions of Section 305 of the World War Veterans' Act to revive his lapsed war risk term insurance.

(2) In holding that a right to insurance benefits under Section 305 may arise upon the death of an insured who had previously become totally and permanently disabled at a time when no disability compensation was due him.

(3) In holding that the Government may be precluded from asserting that an insured became totally and permanently disabled at a time when no disability compensation was due him, if no issue as to his disability was raised by or with the Government until after his death.

(4) In holding that the order of the District Court, as finally amended *nunc pro tunc,* was appealable.

(5) In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals is opposed to the long-continued administrative practice of the Veterans' Administration and its predecessor, the Veterans' Bureau. According to a letter from the Administrator of Veterans' Affairs to the Solicitor General, dated January 14, 1941 (Appendix, *infra,* pp. 22–23), Section 305 of the World War Veterans' Act, 1924 (*supra,* pp. 2–3), has been consistently administered as making no provision, under any circumstances, for revival of insurance by compensation accruing subsequent to the total permanent disability of an insured.

2. Any construction of Section 305 contrary to that consistently followed in its administrative application would ignore the provisions and purposes of the insurance contract, the statute under which it was issued, and the judicial interpretation of these provisions.

The insurance authorized by the statute is against "death or total permanent disability" (Section 400, War Risk Insurance Act, Appendix, *infra,* p. 18), and under the terms of the contract the occurrence of total permanent disability matures the insur-

ance, if in force on that date, dispenses with the payment of premiums, and reduces *pro tanto* the amount of insurance payable at death. See Treasury Bulletin No. 1, Appendix, *infra*, pp. 19–20, and *Boyett* v. *United States*, 86 F. (2d) 66, 68 (C. C. A. 5th). When total permanent disability has occurred the death of an insured cannot mature his contract. As this Court recognized in *United States* v. *Towery*, 306 U. S. 324, 331, rehearing denied, 306 U. S. 668, there is but "*one* critical contingency" which conditions the right to insurance benefits, namely, "the occurrence of permanent total disability or death while the policy remains in force." (Italics ours.) See *Boyett* v. *United States*, *supra*.

There is nothing in Section 305 to indicate an intention on the part of Congress to ignore the provisions of the contract for the maturity of insurance by the single contingency of permanent total disability in those cases in which such disability has occurred. On the contrary, the section provides, as a basis for payment of any benefit authorized therein, that the insurance "shall not be considered as lapsed," and that unpaid premiums are to be deducted from the insurance itself. This conclusive presumption of the continuance, under premium paying conditions, of insurance revived under Section 305 requires the conclusion that it matures and becomes payable, if at all, upon the date of the happening of the contingency against which the insurance is granted, i. e., total permanent disability if it

occurs, or death if total permanent disability does not occur.

Accordingly, in any case in which the insurance lapses at a time when compensation is due and uncollected and the veteran becomes totally permanently disabled, the insurance is revived to the extent made possible by compensation uncollected at that time. But, we submit, if no compensation is uncollected on the date of the first occurrence, in point of time, of one of the two contingencies against which the insurance is granted, no insurance is subject to revival, since the other contingency is no longer insured against. In other words, the sole measure of the insurance revived in any case of total permanent disability is the compensation, if any, uncollected on the date of such total permanent disability.

Moreover, the revival of insurance by compensation accruing to a veteran after he has become totally permanently disabled, would be plainly outside the purpose of Section 305, which is limited to the restoration of insurance in those cases in which, as a possible result of the nonpayment of compensation, a veteran was unable either to avoid the lapse of his insurance or to reinstate it—in other words, the purpose was to do for the veteran what he might have done for himself if the compensation had been paid promptly as it accrued. This purpose was recognized by this Court in *United States* v. *Madigan,* 300 U. S. 500, 504, in which it was stated:

> The legislative history supports the government's argument that from the beginning the aim of the legislation later embodied in § 305 was to permit the veteran to revive his policy when he had allowed it to lapse, for want of funds, at a time when there was money due him from the government for a compensable disability. The supposition was that he would have paid the premiums on the lapsed policy if he had then received the sum due from the government * * *.

Insurance may be reinstated only if a veteran has not become totally permanently disabled. See Section 304 of the World War Veterans' Act (Appendix, *infra*, p. 20). The prompt payment of compensation accruing subsequent to total permanent disability would not, therefore, enable an insured to reinstate his insurance. It follows that the noncollection by an insured of compensation accruing to him after he has become totally permanently disabled, cannot be regarded as having deprived him of the opportunity either to continue or to reinstate his lapsed insurance.

To construe Section 305 as providing a revival of insurance by uncollected compensation accruing after total permanent disability, upon a presumption that the compensation would have been employed by the insured, if paid, to reinstate his insurance would produce an unconscionable result. For such protection is denied a person who, having collected such compensation, should actually seek

to use it for the purpose of reinstating his insurance. The result would be an obviously unwarranted discrimination against the veteran who actually seeks reinstatement in favor of one who never did. Certainly such an intention is not required and should not be imputed to Congress in the interpretation of Section 305.

3. The holding of the Circuit Court of Appeals that the failure of the insured to claim, or of the Government to find, that he was totally permanently disabled during his lifetime precludes a defense based upon the fact of total permanent disability, does not rest upon any provision contained in the World War Veterans' Act.[5] Therefore, if allowed to stand, it would appear to be applicable by analogy to claims against the Government under other statutes.

Presumably the Circuit Court of Appeals considered the Government estopped by the assumed laches of its officials. It is well settled, however, that, in the absence of a statutory provision clearly manifesting an intention to the contrary, public policy requires that the Government be not estopped by the laches or neglect of its officers or agents. *United States* v. *Kirkpatrick*, 9 Wheat. 720, 735–

[5] *United States* v. *Ellison*, 74 F. (2d) 864 (C. C. A. 4th), certiorari denied, 295 U. S. 750, and *United States* v. *Sellers*, 75 F. (2d) 623 (C. C. A. 5th), certiorari denied, 295 U. S. 763, to which the court refers in this connection, rested upon a specific provision of the World War Veterans' Act (Section 205, Appendix, *infra*, p. 21), which, however, clearly has no application to the instant case.

736; *United States* v. *Nashville, &c., R'y Co.*, 118 U. S. 120, 125; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409; *Chesapeake & D. Canal Co.* v. *United States*, 250 U. S. 123, 125; *United States* v. *Wurts*, 303 U. S. 414, 416.[6]

However, we submit that the Government officials were guilty of no undue delay in this case. Section 19 of the World War Veterans' Act (U. S. C., Title 38, Sec. 445) requires, as a condition to the bringing of suit, that a claim be filed in the Veterans' Administration, and that a denial of that claim be obtained. No claim was filed in the Veterans' Administration until June 1931, more than seven years after the death of the insured. This claim was denied in August 1932 (R. 21), slightly more than a year thereafter. This period is not excessive when the large number of claims then pending before the Veterans' Administration is considered.[7]

Furthermore, the determination by the Veterans' Administration that the insured became totally permanently disabled may not be considered as an

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[6] See also *United States v. Loveland*, 25 F. (2) 447 (C. C. A. 3d), error confessed for failure to file a written waiver of jury trial, 278 U. S. 665; *United States* v. *Riggins*, 65 F. (2d) 750 (C. C. A. 9th), rehearing denied July 1933; *United States* v. *Depew*, 100 F. (2d) 725, 728 (C. C. A. 10th).

[7] That the number of then pending claims was large may be inferred from the fact that shortly thereafter suits upon war risk insurance contracts constituted 47.5 percent of the Government's civil litigation. (See Report of the Judicial Conference, September Session, 1934, page 4.)

arbitrary act. It was the duty of the Veterans' Administration to determine the facts in the case in passing upon the respondent's claim. See Section 5 of the World War Veterans' Act (U. S. C., Title 38, Sec. 426). In this connection, it should be noted that, if insurance is revived upon the date of total permanent disability it may be payable to the estate of an insured, whereas, if revived by death it may be payable entirely to a beneficiary, and the amount of the insurance revived may vary markedly according to the facts found. Hence we submit that it was not only within the power of the Veterans' Administration to determine the facts relative to the disability of the insured, but that it was its duty to do so, with no restriction whatever imposed by the fact of the insured's death. There is no basis for assuming that the facts were not correctly determined, and there is, of course, a presumption that official action is properly taken.

4. The importance to the Veterans' Administration of a review of the decision of the court below is indicated by the letter from the Administrator of Veterans' Affairs (Appendix, *infra*, pp. 23–25), in which it is made clear that the statutory construction adopted as the basis for that decision would apply to numerous cases and greatly enlarge the liability of the Government under Section 305, probably by millions of dollars.

5. There is a further question as to the jurisdiction of the Circuit Court of Appeals to have entertained the appeal from the order entered by the District Court, as amended *nunc pro tunc.*

The three counts of the respondent's petition related to a single contract of insurance having a single obligation. Cf. *United States* v. *Towery, supra.* Recovery upon any one of these counts would exclude the possibility of recovery upon any other count. Hence, we submit, they presented inseparable claims, requiring a final adjudication of all of them prior to an appeal from a ruling adverse to the respondent upon any one of them. See *Collins* v. *Metro-Goldwyn Pictures Corp. et al.,* 106 F. (2d) 83, 85 (C. C. A. 2d); *Bowles* v. *Commercial Casualty Ins. Co.,* 107 F. (2d) 169, 170 (C. C. A. 4th); *Jones* v. *St. Paul Fire & Marine Ins. Co.,* 108 F. (2d) 123, 125 (C. C. A. 5th); *Rosenblum* v. *Dingfelder,* 111 F. (2d) 406, 407 (C. C. A. 2d). The order of the District Court in favor of the Government purported to dispose of the third or additional count only, and recited "that the issues presented by the remaining counts * * * remain for disposition" (R. 46).

The holding of the Circuit Court of Appeals that such order was appealable, is based upon its expressed belief that "The counts stated separate causes of action" (R. 43). The contrary view that suits or counts upon a single contract of war risk insurance present a single cause of action because

of the single obligation of that contract has, prior to this decision, been widely held, without question. See *Straw* v. *United States,* 62 F. (2d) 757 (C. C. A. 9th). As a result, in many cases amendments have been permitted to add to the assertion of liability by total permanent disability during the period that an insurance contract remained in force by premium payments, an assertion of liability under Section 305, although an independent suit would have been barred by limitations upon the date of such amendment.

While there is doubt that the judgment of the District Court in the instant case was of such a final character as would give jurisdiction to the Circuit Court of Appeals to review it, the judgment of the latter court constitutes a complete disposition of the case adverse to the Government, the effect of which may be overcome only by the action of this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

JANUARY 1941.

APPENDIX

The first authority to grant war risk insurance was that contained in the Act of October 6, 1917, c. 105, Sec. 2, 40 Stat. 399, 409–410, amending the War Risk Insurance Act by adding the following sections, among others:

> SEC. 400. That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000, or more than $10,000 upon the payment of the premiums as hereinafter provided.
>
> SEC. 402. That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. The insurance shall * * * be payable only to a spouse, child, grandchild, parent, brother, or sister, and also during total and permanent disability to the injured person, or to any or all of them. The insurance shall be payable in two hundred and forty equal monthly installments. * * *.

Bulletin No. 1 (Regulations and Procedure, U. S. Veterans' Bureau (1930), Part II, pp. 1233, 1235) was promulgated by the Director of the Bureau of War Risk Insurance, Treasury Department, on October 15, 1917, and provides, in part, as follows:

> THE UNITED STATES OF AMERICA, TREASURY DEPARTMENT, BUREAU OF WAR RISK INSURANCE
>
> Under the authority granted by Congress in an act * * * and subject in all respects to the provisions of such act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with this policy, the application therefor, and the terms and conditions published under authority of the act, shall constitute the contract:
>
> Hereby insures from and after the day of , 19 , John Doe, * * * conditioned upon the payment of premiums as herein provided, for the principal amount of $5,000 converted into monthly installments of $28.75 (the equivalent, when paid for 240 months, of the sum insured, on the basis of interest at the rate of 3½ percent per annum), payable—
>
> To the insured, if he/she, while this insurance is in force, shall become totally and permanently disabled, commencing with such disability as established by the award of the director of the bureau and continuing during such disability; and
>
> To the beneficiary or beneficiaries hereinafter designated, commencing upon the death of the insured, while the insurance is in force, and (except as otherwise provided) continuing for 240 months if no installments

have been paid for total and permanent disability or if any such installments have been paid, then for a number of months sufficient to make 240 in all: * * *.

Section 304 of the World War Veterans' Act, 1924, as amended (U. S. C., Title 38, Sec. 515) provides, in part:

> In the event that all provisions of the rules and regulations other than the requirements as to the physical condition of the applicant for insurance have been complied with an application for reinstatement, in whole or in part, of lapsed or canceled yearly renewable term insurance or United States Government life insurance (converted insurance) made after June 7, 1924, may be approved if made within one year after July 2, 1926, or within two years after the date of lapse or cancellation: *Provided*, That the applicant's disability is the result of an injury or disease, or of an aggravation thereof, suffered or contracted in the active military or naval service during the World War: *Provided further*, That the applicant during his lifetime submits proof satisfactory to the Administrator of Veterans' Affairs showing that he is not totally and permanently disabled. As a condition, however, to the acceptance of an application for the reinstatement of lapsed or canceled yearly renewable term insurance, where the requirements as to the physical condition of the applicant have not been complied with, or, for the reinstatement of the United States Government life insurance (converted insurance), the applicant shall be required to pay all the back monthly premiums which would have become payable if such insurance had not

lapsed, together with interest at the rate of 5 per centum per annum, compounded annually, on each premium from the date said premium is due by the terms of the policy: * * *.

Section 205 of the World War Veterans' Act, 1924 (U. S. C., Title 38, Sec. 494) provides:

> Upon its own motion or upon application the bureau may at any time review an award and, in accordance with the facts found upon such review, may end, diminish, or increase the compensation previously awarded, or, if compensation is increased, or if compensation has been refused, reduced, or discontinued, may (subject to the provisions of Section 210 hereof) award compensation in proportion to the degree of disability sustained as of the date such degree of disability began, but not earlier than the date of discharge or resignation. Except in cases of fraud participated in by the beneficiary, no reduction in compensation shall be made retroactive, and no reduction or discontinuance of compensation shall be effective until the 1st day of the third calendar month next succeeding that in which such reduction or discontinuance is determined.

Letter from the Administrator of Veterans' Affairs to the Solicitor General:

Office of
The Administrator of
Veterans' Affairs

VETERANS' ADMINISTRATION,
Washington, January 14, 1941.

Honorable FRANCIS BIDDLE,
The Solicitor General,
Department of Justice,
Washington, D. C.

MY DEAR MR. SOLICITOR GENERAL: I have your letter of January 11, 1941, in which you inform me that you have under consideration the question of filing a petition for a Writ Certiorari in the case of Harry Florian, Executor of the Last Will and Testament of Anton Florian, Deceased Beneficiary, Plaintiff-Appellant, vs. The United States of America, Defendant-Appellee, and inquire concerning the relation of that decision to the Administration's practice and the cost which might result from an administrative application of the decision.

The point raised in *Florian* vs. *The United States* has not been the subject of a specific formal administrative decision or written issue, for the reason that such a declaration or issue was not regarded as necessary. Until the present case the administrative interpretation on this point has never been questioned.* The Veterans' Administration and its prede-

* In this connection it should be noted that the various service organizations have had access to the files of the Veterans' Administration by specific authority of statute (see U. S. C., Title 38, Sections 456, 551) and, of course, could not have been unaware of this interpretation.

cessors consistently adhered to the view that Section 305 of the World War Veterans' Act contained no provision, either express or by implication, for the revival of insurance under a yearly renewable term contract by reason of compensation arising subsequent to the total permanent disability of the insured. This practice has continued without change under the several amendments to Section 305, originally enacted June 7, 1924 and amended in various particulars July 2, 1926 and May 29, 1928. The Section in its original form and as it now stands contains no language which, in the opinion of the Veterans' Administration, indicates any intention to alter or modify the administrative procedure in this particular. Consequently, the decision of the Circuit Court of Appeals in the *Florian* case is unmistakably contrary to long continued and uninterrupted administrative practice.

It is difficult to estimate with any degree of accuracy the number of cases to which the instant decision might apply, as there are no statistics available to show the number of claims potentially affected, with the natural result that there are also no precise figures available as to the total amount of insurance which may be revived if the Florian case stands unchallenged.

If, however, the decision of the Circuit Court of Appeals here is permitted to stand, claims for insurance previously denied because there was no uncollected compensation available at date of permanent and total disability will be revived where there was uncollected compensation at the date of death. The Florian decision would appear to have potential application to any case in which the first condition of Section 305, World War Veterans' Act, 1924, as amended, may

have been met (that is, where there was uncollected compensation at date of lapse) and where the insured died with compensation uncollected which is payable only by reason of an administrative rating of total and permanent disability. The first condition of Section 305 was met in thousands of cases because there were issued approximately 4,000,000 contracts of yearly renewable term insurance, the vast majority of which lapsed upon discharge. Virtually every case in which the term insurance lapsed at discharge and claim for compensation was made more than sixty days after lapse and allowed as of the date of discharge would meet the first requirement of Section 305 of the World War Veterans' Act, 1924, as amended. Probably in relatively few instances were claims filed within sixty days from discharge and even in these cases administrative action with an award of compensation and an actual payment could seldom be made until after sixty days from discharge, owing to obvious administrative difficulties and the volume of work then involved. Claims for compensation have been filed in approximately one and three-quarter million cases.

While a very accurate estimate may not be given as to the number of cases where posthumous ratings of total permanent disability have been made, these were numerous because death in any case where there was a chronic disease (as distinguished from an accidental or unanticipated death) suggests the likelihood of an earlier total permanent disability; and it was the administrative practice to make such findings after death to insure payment to the estate of the veteran of the full amount of benefits that might be payable under the law even though the vet-

eran did not file claim on such basis prior to his death. The foregoing analysis leads to the conclusion, upon a most conservative basis, that the number of potential cases which would be affected is extremely large. A study indicates that the average amount of term insurance in each instance would probably be about $7,000.00. On this premise the total amount which would be payable if the *Florian* case is to be given the effect which it may be said to call for would ultimately involve many millions. Permit me to urge that every effort be exerted looking toward the filing of a petition for a Writ of Certiorari in this matter.

Very truly yours,

(Sgd.) FRANK T. HINES,
Frank T. Hines,
Administrator.

U. S. GOVERNMENT PRINTING OFFICE: 1941

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1039

THE UNITED STATES OF AMERICA, PETITIONER

v.

ANNA SHEPANEK, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM BABICZ, ALSO KNOWN AS WILLIAM LA VALLEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above entitled case on December 13, 1941.

OPINIONS BELOW

The District Court for the Northern District of Illinois rendered no opinion. The opinion of the Circuit Court of Appeals is reported in 124 F. (2d) 747.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 13, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether compensation accruing to a World War veteran after he has become totally permanently disabled may be used under the provisions of Section 305 of the World War Veterans' Act to revive his lapsed war risk term insurance where such compensation was uncollected on the date of the death of the veteran.

An incidental question presented is—

Whether the fact that no issue was raised between the Government and an insured during his lifetime as to whether he was totally permanently disabled precludes a defense to a claim for the revival of lapsed insurance under Section 305 that the insured became totally permanently disabled at a time when no compensation was due him.

STATUTES INVOLVED

Section 305 of the World War Veterans' Act, as amended, will be found in the petition for a writ of certiorari (pp. 2–3) in *The United States of America* v. *American National Bank and Trust Company of Chicago, Administrator, etc.*, No. 1038,

present term, filed simultaneously with this petition. A letter from the Administrator of Veterans' Affairs to the Solicitor General, dated February 16, 1942, appears in the Appendix to that petition (pp. 12–14). The other pertinent statutes and a letter from the Administrator of Veterans' Affairs to the then Solicitor General, dated January 14, 1941, appear in the Appendix to the Government's petition for a writ of certiorari (pp. 18–25) in *United States* v. *Florian,* 312 U. S. 656, nine copies of which have been filed with the petition in the *American National Bank and Trust Company* case for the convenience of the Court.

STATEMENT

This suit on a $2,000 policy of war-risk term insurance was brought December 30, 1938, in the District Court of the United States for the Northern District of Illinois by the respondent, Anna Shepanek, as beneficiary and as administratrix of the estate of the insured. (R. 2–4.) In an amended petition (R. 8–12) she sought benefits on the basis of an alleged revival of the insurance under Section 305, World War Veterans' Act, upon the death of the insured. It was alleged, in effect, in the amended petition (and admitted in the Government's answer (R. 13–15)) that the insurance lapsed on January 1, 1919, while the insured was suffering from a compensable disability for which compensation was uncollected

(R. 9), and that on the date of his death, December 23, 1922 (R. 8), he was entitled to compensation remaining uncollected in an amount sufficient to have maintained the insurance in force to that date (R. 10).

The Government based its defense solely upon affirmative allegations in its answer (R. 13–15) that the insured became totally and permanently disabled on July 10, 1921, and that on that date he was not entitled to any uncollected compensation (R. 14–15). The compensation accruing after that date and remaining uncollected on the date of the insured's death could not, the Government asserted in effect, be applied to the revival of the insurance. (R. 15.)

The respondent moved for a summary judgment awarding death benefits. (R. 17.)[1] The Government filed an answer to the motion (R. 20) stating in effect that it stood upon the affirmative allegations in its answer as to the occurrence of total permanent disability at a time when the insured was not entitled to any uncollected compensation.

The District Court entered judgment for the respondent in accordance with the motion (R. 22–26), thus rejecting the Government's defense. The Government appealed. (R. 27.) The Cir-

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[1] The motion was based on the amended petition (R. 8–12), admissions in the answer (R. 13–15), a stipulation of facts (R. 16), and an affidavit in support of the motion (R. 18–19).

cuit Court of Appeals for the Seventh Circuit affirmed upon the authority of its decision rendered the same day in the *American Nat. Bank and Trust Co.* v. *United States*, 124 F. (2d) 743, review of which, as previously stated, is sought by the Government in a petition (No. 1038) filed simultaneously with the present petition.

SPECIFICATIONS OF ERRORS TO BE URGED

The errors to be urged are identical with those specified in the Government's petition for a writ of certiorari in *The United States of America* v. *American National Bank and Trust Company of Chicago, Administrator, etc.*, No. 1038.

REASONS FOR GRANTING THE WRIT

The present petition should be granted for the reasons set forth in the Government's petition for a writ of certiorari in *The United States of America* v. *American National Bank and Trust Company of Chicago, Administrator, etc.*, No. 1038, and elaborated in the Government's petition for a writ of certiorari in *United States* v. *Florian*, 312 U. S. 656.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

MARCH 1942.

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No. 1038

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, Administrator, Etc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

STEPHEN A. CROSS,
Attorney for Respondent,
Room 852, No. 10 So. La Salle St.,
Chicago, Illinois.

EDWARD H. S. MARTIN,
Of Counsel.

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In The

Supreme Court of the United States

October Term, 1941.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, Administrator, Etc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

As stated in petition.

JURISDICTION.

As stated in petition.

QUESTIONS PRESENTED.

As stated in petition.

A further question is whether petitioner may have a review by certiorari in a case not falling under any of the approved grounds mentioned in Rule 38 and presenting no other question of great importance.

A still further question is whether, for the purpose of showing a long established administrative interpretation or practice, or alleged importance of the questions sought to be reviewed, petitioner may, long after the cause has left the District Court, write letters to itself and print these as an appendix to its petition for consideration on petition for certiorari, without regard to the distinctions between the original and appellate jurisdiction of the Supreme Court to be found in Section 2, Article III of the Constitution of the United States.

STATUTES INVOLVED.

The statutes mentioned in the petition and also the second paragraph of Section 2, Article III of the Constitution of the United States, as follows:

> "In all cases, affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make."

STATEMENT.

The statement in the petition is sufficient.

ARGUMENT.

I.

Petitioner's specifications of error 1, 2 and 3 deal with the construction of Section 305 of the World War Veterans' Act and the reasons for the Court of Appeals' construction of such section are so clearly and rightly set forth in its opinion in the cases of *U. S.* v. *Am. N. B. & T. Co.*, 124 F. (2) 743, and *Florian* v. *U. S.*, 114 F. (2) 990, and so well supported by *U. S.* v. *McClure*, 305 U. S. 472, that we will not further comment on those specifications of error.

II.

None of the conventional reasons for allowing certiorari stated in Rule 38 are shown in the petition to exist.

An alarmist note is sought to be injected into the matter by petitioner through writing a letter to itself and attaching the same as an appendix to its petition, calling attention to the number of insurance contracts issued. It is not to be supposed, and there is no showing, that any more than a negligible number of these would ripen into liabilities under the doctrine established in the instant case. Death, maturity of the contract, conversion to other forms of insurance which have matured or been surrendered for cash value and the statute of limitations, as well as the fact that the vast majority were not suffering from any compensable disability when the insurance lapsed, and also the present amended form of Section 305 limiting its operation to a highly restricted class of beneficiaries, make it certain that the amount to be paid on such classes

of claims will be very small. At any rate, the amount to be paid under a correct interpretation of the law ought to have no influence whatever in this court in the determination of what is a correct interpretation of that law.

III.

Petitioner's specification of error 4 deals with the alleged overturning by the Court of Appeals of an alleged consistent and long established administrative practice and interpretation. Our argument here will be confined to that specification of error.

A government practice made use of with increasing frequency is herein resorted to. We refer to the letter which the Government has written to itself February 16, 1942, printed in the appendix to its petition, and the similar one in the petition in the *Florian* case, on which it relies to prove a long established administrative interpretation and practice. We do not concede that there has been any such long established interpretation or practice, and we do not believe sufficient similar cases have arisen in the past to formulate the same. No specific administrative decisions have been cited. No such claim was made in the District Court and that court did not pass upon any such question. If such letters are to be considered by the Supreme Court on certiorari, that court must then disregard the constitutional distinctions (Section 2, Article III) between its original and appellate jurisdiction and assume original jurisdiction in this case to decide a question not presented to the District Court and without opportunity to respondent to contest that question on the facts. A very similar situation arose in Illinois under a provision of its new Practice Act, giving litigants the right to make amendments and offer evidence in courts of review which had not been made or offered in the trial

court, and the Illinois Supreme Court, in *Schmidt* v. *Eq. L. A. Soc.*, 376 Ill. 183, 197-8, decided that such a practice would involve the exercise of original jurisdiction by the court of review and would be in violation of the Constitution. The Illinois statute we refer to provides in part as follows:

> "In all appeals the reviewing court may, * * *
>
> (c) Permit such further testimony to be taken in or presented to the reviewing court as it may deem necessary, where evidence has been erroneously excluded or where there has been an omission of proof at the trial of some fact which, under the circumstances of the case, may subsequently be proved without involving any question for a jury and without substantial injustice to either party."
>
> Ill. R. S. 1939, Ch. 110, Par. 216.

Section 2, Article VI, Illinois Constitution, provides in part as follows:

> "The supreme court * * * shall have original jurisdiction in cases relating to the revenue, in mandamus and habeas corpus, and appellate jurisdiction in all other cases."
>
> Smith-H. Ill. Annot. Stat., p. 178.

In line with the same principle it has been decided that even Congress cannot give the Supreme Court original jurisdiction beyond that given in the Constitution.

> *Ex p. Vallandingham*, 1 Wall. (68 U. S.) 243, 252, 17 L. Ed. 589.
>
> *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 174-6.
>
> *F. R. C.* v. *Gen. E. Co.*, 281 U. S. 464, 469, 74 L. Ed. 969.

CONCLUSION.

Regardless of whether the case is important or not, the result below seems clearly right and agrees with the decision of the Sixth Circuit in *U. S.* v. *Lawson*, 124 F. (2) 1020. Conflict of decision does not seem likely in the future. The petition should be denied.

STEPHEN A. CROSS,
Attorney for Respondent.

EDWARD H. S. MARTIN,
Of Counsel.

(27)

No. 1039

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

ANNA SHEPANEK, Individually and as Administratrix of the Estate of William Babicz, also known as William La Valley,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

EDWARD H. S. MARTIN,
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Room 1140 Otis Building,
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Chicago, Illinois.

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In The

Supreme Court of the United States

October Term, 1941.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

ANNA SHEPANEK, Individually and as Administratrix of the Estate of William Babicz, also known as William La Valley,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Except as otherwise stated herein, we adopt as ours the brief and argument in opposition filed by respondent in No. 1038, *U. S.* v. *Am. N. B. & T. Co. of Chi., Admr.*, referred to in the petition. Those exceptions follow:

QUESTIONS PRESENTED.

Although the questions stated in the petition are not really presented by the record in this case, yet, if presented, our contentions with respect thereto would be the same as in respondent's brief and argument in No. 1038. They are not presented because the summary judgment was rendered below on the facts and there was no statement under oath and no admission tending in any way to substantiate the allegation of petitioner's answer that the deceased ever became totally and permanently disabled. The real question presented, therefore, is:

Whether, under the Rules of Civil Procedure, the bare, unsworn statement in a pleading, unsupported by any admission or subsequent affidavit, will deprive a plaintiff of a right, otherwise duly established, to a summary judgment.

STATUTES INVOLVED.

In addition to those mentioned in No. 1038, there is Rule 56 of the Rules of Civil Procedure, governing summary judgments, the material parts of which are as follows:

> "(c) * * * The adverse party prior to the date of hearing may serve opposing affidavits. The judgment shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *
>
> (e) Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

STATEMENT.

The statement in the petition is sufficient, except that it should be noted that the Government's answer to the amended petition and its answer to the motion for summary judgment were neither of them verified and there was no affidavit nor admission substantiating the allegations thereof with respect to total permanent disability.

ARGUMENT.

I, II and III.

We adopt the argument under the above numerical headings in respondent's brief and argument in opposition in No. 1038.

IV.

Even if certiorari were allowed in No. 1038, it would still be useless to allow it in the instant case, where the District Court did not strike out any part of the Government's answer, but considered the matter purely on the admissions and the affidavit offered in support of respondent's motion for summary judgment and granted such judgment. The allegations in the Government's answer to the effect that the deceased became totally and permanently disabled, and the time thereof, are so many mere words, unsupported by any affidavit or admission, and are therefore nothing but a sham pleading. Respondent's motion was supported by affidavits and admissions showing a clear right to a summary judgment, and no unverified statement in any Government pleading could take away the right to such judgment, for that is one of the very purposes of Rule 56, Rules of Civil Procedure,

namely, to prevent delay in recovery of judgment by mere sham allegations in pleadings, when there is no evidence whatever tending to support such allegations.

Not that they are of any binding force, but merely to show how the lower courts are construing this rule, we cite the following:

> "The purpose of this rule 'is to dispose of cases when there is no *genuine* issue of fact even though an issue may be raised formally by the pleadings.'"
>
> *Miller* v. *Miller,* 122 F. (2) 209, 212 (App. D. C.).

> "Had the affidavits been retained in the files, the result should not have been different. They did not state facts sufficient to create a 'genuine issue as to any material fact,' within Rule 56c, upon the controlling issue in the case."
>
> *Fox* v. *Johnson & W., Inc.*, ... F. (2) ...., 5 F. Rules Serv. 56c 41, Case 6 (App. D. C.).

> "Nothing remained to be shown except that the coupons were actually clipped from the genuine bonds and the amount for which judgment should be entered. It was entirely in keeping with the letter and spirit of Rule 56 that this could be done by *ex parte* affidavits which were not offset by opposing affidavits."
>
> *Bd. of Pub. Inst.* v. *Meredith,* 119 F. (2) 712 (CCA 5).

To the same effect are:

Cudahy P. Co. v. *U. S.*, 37 F. Supp. 563 (N. D. Ill.).

Hemler v. *Un. P. Co.*, 40 F. Supp. 824 (W. D. La.).

CONCLUSION.

Regardless of whether the case is important or not, the result below seems clearly right and agrees with the decision of the Sixth Circuit in *U. S.* v. *Lawson,* 124 F. (2) 1020. Conflict of decision does not seem likely in the future. Even if petitioner's argument as to the effect of prior total permanent disability is sustained and a reversal follows in the *Lawson* case and in No. 1038, the judgment would still have to be affirmed in the instant case, because of the lack of any verified allegation of such total permanent disability. The petition should be denied.

EDWARD H. S. MARTIN,
Attorney for Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1038

THE UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, ADMINISTRATOR, ETC.

No. 1039

THE UNITED STATES OF AMERICA, PETITIONER

v.

ANNA SHEPANEK, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM BABICZ, ALSO KNOWN AS WILLIAM LA VALLEY

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 1090

THE UNITED STATES OF AMERICA, PETITIONER

v.

PEARLIE LAWSON, ADMINISTRATRIX OF THE ESTATE OF HOBART LAWSON, DECEASED, AND JOHN A. POLIN, ADMINISTRATOR OF THE ESTATE OF HENRY LAWSON, BENEFICIARY, DECEASED

456810—42

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN REPLY TO THE BRIEFS IN OPPOSITION

1. There is, we submit, no merit in the contention of respondents in Nos. 1038 and 1039 (No. 1038, Br. in Opp. 4–5; No. 1039, Br. in Opp. 3) that this Court should not consider the letters of the Administrator of Veterans' Affairs printed in the appendices to the Government's petitions for writs of certiorari in No. 1038 (pp. 13–14) and in the *Florian* case (pp. 22–25) as showing a long continued and consistent administrative practice, in accordance with the interpretation of Section 305, World War Veterans' Act, urged by the Government.

(a) It cannot be doubted that administrative practice is a proper subject of judicial notice. *Orchard* v. *Alexander,* 157 U. S. 372, 383; *United States* v. *Minnesota,* 270 U. S. 181, 205; *Smith* v. *United States,* 56 F. (2d) 636, 638 (D. C. S. D. Ia.); *Bloxham, Comptroller* v. *Consumers Electric Light & Street Railroad Co.,* 36 Fla. 519, 540–541. See also *Caha* v. *United States,* 152 U. S. 211, 221–222; *Helvering* v. *Bliss,* 293 U. S. 144, 151. Such administrative practice, like any other matter within the scope of judicial notice, may be ascertained from any trustworthy source. *The Montello,* 11 Wall. 411, 414–415; *Brown* v. *Piper,* 91 U. S. 37, 42; *Jones* v. *United States,* 137 U. S. 202, 216.

That official letters of the Veterans' Administration constitute a source of this character would seem beyond question. Such letters are disclosed by the opinions of this Court in *United States* v. *Madigan,* 300 U. S. 500, 505, note 6, and in *United States* v. *Towery,* 306 U. S. 324, 332, note 10, as the source of the Court's information with respect to the administrative practice. And that a similar letter was the source of the Court's information in *United States* v. *Patryas,* 303 U. S. 341, is clearly indicated by a comparison of a statement and two quotations in the opinion at p. 346 with the letter to the Solicitor General contained in the Appendix to the Government's brief at pp. 59, 62; 61, and 60, respectively.[1] See also *Byrd* v. *United States,* 106 F. (2d) 821, 824 (C. C. A. 10). This Court has similarly taken judicial notice of official statements based upon the records of other departments of the Government made by the officials in charge of those departments (*Heath* v. *Wallace,* 138 U. S. 573, 584; *Underhill* v. *Hernandez,* 168 U. S. 250, 253), as have other courts (*United States* v. *Brewer-Elliott Oil & Gas Co.,* 249 Fed. 609, 619 (D. C. W. D. Okla.); *Universal Adjustment Corp.* v. *Midland Bank,* 281 Mass. 303, 327).

(b) Administrative practice, like legislative history, is a recognized aid to the court itself in any

[1] In *United States* v. *Worley,* 281 U. S. 339, 343, this Court took judicial notice of the practice of the Veterans' Bureau which was called to its attention merely by a statement in the Government's brief, p. 22.

case involving a question of the construction of a statute of general application. Every such case involves not merely the rights of the parties to the litigation but also the rights of other persons who will be affected by the court's construction of the statute. Hence, as a matter of public policy, as well as for its own assistance, a court is not limited to evidence or information offered by the parties themselves but may ascertain the administrative practice upon its own motion just as it may ascertain the facts with respect to other matters within judicial knowledge. Cf. *The Montello,* 11 Wall. 411, 414–415.

Since administrative practice is an aid to statutory construction and within judicial knowledge, it is, of course, not an exercise of original jurisdiction, in violation of Section 2, Article III, of the Constitution, as respondents argue (No. 1038, Br. in Opp. 4–5; No. 1039, Br. in Opp. 3), for an appellate court to consider administrative practice not considered by the District Court.[2] See *New*

[2] Respondents in Nos. 1038 and 1039 (No. 1038, Br. in Opp. 4; No. 1039, Br. in Opp. 3) infer that the District Court was not apprized in these cases of the administrative practice. With respect to each of these cases this inference is opposed to the recollection of Government counsel who handled the cases in the District Court. Moreover, counsel for respondent in No. 1038 likewise appeared as counsel in the *Florian* case and thus was made fully aware of the administrative practice as recited in that case in the Government's brief in the Circuit Court of Appeals and in the Government's petition for a writ of certiorari (pp. 22–25). The statement relative to the administrative practice was not challenged

York Indians v. *United States,* 170 U. S. 1, 32; *de Bearn* v. *Safe Deposit Co.,* 233 U. S. 24, 32; *Fourth National Bank* v. *Francklyn,* 120 U. S. 747, 751–752; *Rogers* v. *Cady,* 104 Cal. 288, 290. See also *United States* v. *Brewer-Elliott Oil & Gas Co.,* 249 Fed. 609, 619 (D. C. W. D. Okla.), in which the District Court took judicial notice, over objection, of letters which were written to the Attorney General by the Secretary of the Interior after the trial of the case.[3]

(c) Because administrative practice is within judicial knowledge and is a recognized aid to the judiciary in cases involving questions of statutory construction, the Government has consistently called such practice to the attention of the courts in those veterans' cases in which it has been deemed pertinent, whether or not the effect was favorable to the Government's position in the particular case. See the briefs for the Government in *Frederick* v. *United States,* 294 U. S. 695 (Br. 6–16, 21–22); *United States* v. *Patryas,* 303 U. S. 341, 346 (Br. 59, 62; 61, 60); *United States* v. *Jackson,* 302 U. S. 628 (Br. 34–36, 80–85). A brief for the

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in the *Florian* case either in the Circuit Court of Appeals or in this Court.

[3] The decision of the District Court was affirmed by the Circuit Court of Appeals, *Brewer-Elliott Oil & Gas Co.* v. *United States,* 270 Fed. 100 (C. C. A. 8), and the decision of that court was affirmed by this Court, *Brewer-Elliott Co.* v. *United States,* 260 U. S. 77. Neither this Court nor the Circuit Court of Appeals mentioned the ruling of the District Court with regard to judicial notice.

Veterans' Administration was filed in opposition to the Government's position in *Miller* v. *United States,* 294 U. S. 435, with the consent, of course, of the Solicitor General. See also *Byrd* v. *United States,* 106 F. (2d) 821, 824 (C. C. A. 10); *Boyett* v. *United States,* 86 F. (2d) 66, 67–68 (C. C. A. 5). Furthermore, the Veterans' Administration, so far as we have been able to ascertain, has never refused a request by an attorney for a private litigant for information as to its interpretation and practice.

(d) Respondents argue that no established administrative practice exists or that it has little force because "No specific administrative decisions have been cited" in the letters on which the Government relies (No. 1038, Br. in Opp. 4; No. 1039, Br. in Opp. 3; No. 1090, Br. in Opp. 4).

The contention ignores the relationship of the Veterans' Administration to veterans and their dependents which renders a failure to award benefits fully as significant as a formal denial of claim asserted.

As recognized by this Court in *White* v. *United States,* 270 U. S. 175, 180, the relation of the Government to veterans and their dependents is at least "avuncular" if not "paternal." In this light the Veterans' Administration assumes the duty of initiating action where it is found that benefits authorized by law have not been claimed. The administrative practice in this respect is a corollary of the legislative policy minimizing the participation of attorneys in the presentation

of claims[4] and providing for the recognition of "representatives of the American Red Cross, the American Legion, the Disabled American Veterans, and Veterans of Foreign Wars and * * * other organizations * * * in the presentation or adjudication of claims * * *." (Sec. 500, World War Veterans' Act, as amended, 38 U. S. C. 551.) In view of the elaborate safeguards against any failure to award benefits authorized by statute, the administrative practice is as clearly established by inaction as by denial. Thus the absence of any administrative award of such benefits as those sought in the instant cases discloses a positive and consistent view that Congress did not intend to grant them, while the absence of earlier claim reflects the acquiescence of informed and interested opinion in this view. In the letter of the Administrator of Veterans' Affairs, copied in the *Florian* petition, it is stated (p. 22): "Until the present case the administrative interpretation on this point

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[4] Section 500, World War Veterans' Act, 1924, as amended, 38 U. S. C. 551, limits to $10 the amount of the fee which may be charged by an attorney or agent for assisting in the preparation and execution of the necessary papers in any application to the Administration.

In the report of the Attorney General's Committee on Administrative Procedure, it is stated (Senate Document No. 8, 77th Cong., 1st Sess., p. 38): "The claimant is assisted in the preparation and development of his claim by representatives of the agency accessible to him in the field. Where specialized or expert knowledge is necessary for the decision of cases, these agencies have developed special administrative units to flrnish the needed aid. * * *"

has never been questioned" although (p. 25) "the number of potential cases which would be affected is extremely large."[5]

2. Respondents in Nos. 1038 and 1039 refer to various factors which they assert, contrary to the Administrator's estimate, will render negligible the number of cases to which the construction of Section 305 by the court below will apply (No. 1038, Br. in Opp. 3–4; No. 1039, Br. in Opp. 3).

Respondents do not challenge the Administrator's statement (Pet. in No. 1038, 13; pet. in the *Florian* case, 24) that the vast majority of more than four million war risk insurance contracts were allowed to lapse when the insureds were discharged from the service.[6] Contrary to respondents' assertion, surrender for cash of a policy to which one of these contracts may have been converted would not necessarily bar a claim for benefits based upon a revival of the original insurance contract under

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[5] Since administrative practice is a proper subject of judicial notice, it is beside the point that, as stated by the respondent in No. 1090 (Br. in Opp. 4), there has been "no finding of fact or conclusion of law" in regard to such practice. *New York Indians* v. *United States*, 170 U. S. 1, 32. No. 1090 was decided upon a stipulation of facts which included a recitation of the administrative practice.

[6] In *Lynch* v. *United States*, 292 U. S. 571, 576, note 2, annual reports of the Bureau of War Risk Insurance and United States Veterans Bureau were relied upon as authority for the statement that over 75% of the men who carried term insurance while in the service never paid a premium after the war.

Section 305. *United States* v. *Arzner,* 287 U. S. 470.

Respondents' assertion that the "vast" majority of insured persons were not suffering from a compensable disability when their insurance lapsed is scarcely credible in view of the statement of the Administrator, not denied by respondents, that approximately one and three-quarter million claims for compensation have been filed (Pet. in No. 1038, 13; pet. in the *Florian* case, 24). In any event, the nonexistence of a compensable disability at the time of the lapse of the insurance in a vast majority of approximately one and three-quarter million cases would not be inconsistent with the statement of the Administrator to the effect that such disability existed at that time in thousands of cases (Pet. in the *Florian* case, 24), each of which involved insurance amounting on the average to $7,000 (ibid. 25).

There is no ground for respondents' contention that the statute of limitations would reduce the amount to be paid under the construction of Section 305 adopted by the court below. The statute (Section 19 of the World War Veterans' Act, 1924, as amended, 38 U. S. C. 445) applies only to suits in court. There is no time limitation upon filing claims in the Veterans' Administration, and it will be presumed that administrative payment would be made in such cases without the necessity of resorting to suit if that construction of the section should

prevail. Cf. *United States* v. *Towery,* 306 U. S. 324, 331.

Maturity of contracts, listed by respondents as another factor tending to render questionable the Administrator's estimate of the number of cases to which the construction in question would be applicable, has no such effect. The Administrator manifestly took into consideration the number of insurance contracts which had matured by death or total permanent disability while the insureds were in service when he made the statement that the vast majority of the contracts lapsed when the insureds were discharged from the service. It is, therefore, obvious that the percentage of those cases was comparatively small in which either the original or the converted insurance contract matured subsequent to the discharge of the insured.

The restriction in Section 305 upon the class of persons entitled to benefits of insurance revived under that section is also listed by respondents as another factor affecting the Administrator's estimate. But this restriction ordinarily affects merely the determination of the person to whom payment is to be made. It applies only to cases in which total permanent disability or death occurred subsequent to July 2, 1926, the date of the original enactment of the restriction (35 Op. A. G. 241; *Hegg* v. *United States,* 21 F. (2d) 622 (D. C.

Minn.)) and, in any event, was undoubtedly considered by the Administrator.[7]

Respectfully submitted.

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[7] Respondent in No. 1039 argues that even if certiorari were allowed in No. 1038, it should not be granted in her case because the District Court was not asked to strike any part of the Government's answer. Indeed, she asserts that the allegations in that answer with respect to total permanent disability of the insured at a time when no compensation was due and uncollected were "unsupported by any affidavit or admission, and are therefore nothing but a sham pleading." Consequently, she insists that she was entitled to summary judgment under Rule 56 of the Federal Rules of Civil Procedure by virtue of her own motion and the supporting affidavit. (Br. in Opp. 3.)

The attack upon the good faith of the Government's answer is unjustified, especially in view of respondent's own allegation of total permanent disability occurring prior to the date alleged by the Government. (R. 3.) Moreover, Rule 11 of the Federal Rules of Civil Procedure expressly provides that "pleadings need not be verified or accompanied by affidavit." Since respondent did not controvert the Government's allegation as to total permanent disability in her motion for summary judgment or supporting affidavit, she must be regarded as having admitted the allegation for the purpose of her motion, thus presenting the same question of law as that involved in No. 1038.

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